No. 93-446

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HPY INC.,

Petitioner,

v.

ELECTRIC POWER AUTHORITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 6, 1993

QUESTIONS PRESENTED

Whether a claim pursuant to 42 U.S.C. § 1983 should be dismissed with prejudice under Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted when Rule of Civil Procedure 9(b) does not require a heightened pleading standard for Civil Rights claims and a court is under a duty to examine the complaint to determine if the allegations provide relief on any possible legal theory under Rule 8(a) of the Federal Rules of Civil Procedure.

Whether a procedural due process claim is stated under 42 U.S.C. § 1983 when high level public corporation officials exercise broadly delegated power and authority enumerated under state enabling acts to effect a deprivation of a property interest, notwithstanding their duty to implement procedures to prevent the deprivation.

Whether a substantive due process claim alleged in a 42 U.S.C. § 1983 action is perfected at the time a person who while acting under color of state law, unreasonably and capriciously builds improvements on land knowingly belonging to another.

Whether a State's denial of intervention in State condemnation proceedings exhausts State remedies to perfect a claim for unjust compensation for a takings claim alleged in a 42 U.S.C. § 1983 action and pursuant to the Fifth Amendment to the United States Constitution.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, HPY Inc. ("HPY"). HPY was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

(1) Jose A. Del Valle, in his individual and official capacity as Director of the Electric Power Authority and The Electric Power Authority itself.

(2) Maria Margarita Irizarry, in her individual and official capacity as Director of the Aqueduct and Sewer Authority and the Aqueduct and Sewer Authority itself.

(3) Gamalier Rodriguez Mercado, in his individual and official capacity as Director of the Rural Housing Administration and the Rural Housing Administration itself.

HPY, INC. - a Delaware Corp., with offices at 1031 West Morse Boulevard, Suite 300, Winter Park, Florida, pursuant to F.R.A.R. 26.1 identifies all parent companies, and affiliates of the Plaintiff-Appellant:

a. Osceola Financial Corporation, a Nevada Corporation, is the parent company and owns 100% of the outstanding and issued shares of stock of the plaintiff-appellant, HPY, Inc.

b. James T. Barnes, Jr., 1987 Irrevocable Trust own 100% of the outstanding and issued shares of stock of Osceola Financial Corporation.

c. John E. Amerman, Esq., of Detroit, Michigan, is the trustee of the James T. Barnes, Jr., 1987 Irrevocable Trust; and
the sole beneficiary of the Trust is James T. Barnes, Jr., of the State of Florida.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner HPY Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on April 15, 1993 and the order denying a rehearing entered on May 11, 1993.

OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") affirming the dismissal of the complaint with prejudice is not reported and is reprinted in the Appendix at A-1. The Order of the Court of Appeals denying rehearing is not reported. That is reprinted in the Appendix at ~~A-6~~ A-9. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court"). The District Court's opinion and order is not reported and is reprinted in the Appendix at ~~A-8~~ A-12 (hereinafter "App. at A-___").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under

the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on April 15, 1993. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on May 11, 1993. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The Constitutional provisions involved are the Fifth and Fourteenth Amendments. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

> public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Statutory provision involved in the case, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Procedural History

This case arises out of a dispute over the taking of land by squatters and various public corporations without just compensation and without due process of law in the City of Ponce in the Commonwealth of Puerto Rico. Petitioner's complaint was file on April 16,

1992 in the District Court under 42 U.S.C. § 1983. The complaint alleged, *inter alia*, that the respondent's had violated petitioners rights to procedural and substantive due process under the . Fourteenth Amendment and had violated petitioner's right to just compensation pursuant to the takings clause of the Fifth Amendment. Petitioner's complaint alleged deliberate misconduct by the respondents and because injunctive relief was sought, respondents have also.been sued in their individual capacities.

With the exception of the Electric Power Authority and its Director, respondents did not answer the complaint but rather moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. The motions were granted dismissing the complaint with prejudice. HPY filed a timely appeal. The Court of Appeals affirmed the dismissal on April 15, 1993.

Petitioner sought rehearing, which request was denied on May 11, 1993.

Facts Material to the Questions Presented

HPY owns five large tracts of land in Ponce, Puerto Rico in an area known as Canas Ward. In 1985, HPY had discovered that numerous squatters had invaded its land and had built shacks and other structures with the intent of remaining on the land. Because of the large number of squatters which by this time numbered into the hundreds, it was impracticable to remove the individual squatters one by one. Therefore, HPY filed an unlawful detainer complaint on October 9, 1986 in the Superior Court of Ponce, Puerto Rico, which rendered its final judgment in favor of HPY on June 4, 1991 and is included in the Appendix at ~~A-42~~ A-71.

Prior to the rendition of the final judgment of the unlawful detainer action, HPY filed an inverse condemnation claim against the

Commonwealth of Puerto Rico on November 20, 1987 (Appendix at ~~A-24~~ A-38). A condemnation claim was also filed by the Commonwealth of Puerto Rico for land near to HPY on October 10, 1988. During the period of time between the filing of the condemnation proceeding by the Commonwealth and a final determination of the inverse condemnation proceeding, the Rural Housing Administration sent a surveyor to prepare a certified survey of the plots of invaded land to include said measurement in the Commonwealth's expropriation proceeding.

As determined by an independent surveyor hired by HPY (App. at ~~A-63~~ A-111), the Rural Housing Administration's surveyor had used erroneous landmarks in his calculated assessment of the invaded property. This error resulted in land belonging to HPY to be included in the erroneous survey. (App. at ~~A-63~~ A-111) Based on the belief that the Commonwealth now had an intent to expropriate HPY's land, HPY requested a

voluntary dismissal without prejudice on June 6, 1989 because HPY believed that its land would be included in the pending expropriation proceeding filed by the Commonwealth. (App. at A-31) On April 20, 1990, a Judgment was issued granting the voluntary dismissal but did so by dismissing with prejudice. (App. at A-32).

HPY filed a motion to intervene in the Commonwealth's expropriation proceeding on March 30, 1990, (App. at A-33) which was denied on October 30, 1990. (App. at A-35) The Commonwealth maintained in its expropriation proceeding that it had no interest in expropriating HPY's land. (App. at A-36) Therefore, HPY continued to pursue its pending unlawful detainer action in Ponce, Puerto Rico.

Meanwhile, without prior notice or an opportunity to be heard, the Rural Housing Administration, under color of State law, granted the Aqueduct and Sewer Authority and the

Electric Power Authority, the authorization to provide utility and other miscellaneous services to the squatters including the building of structures in the assistance of same.[1]

HPY then filed a 42 U.S.C. § 1983 complaint in the District Court for the District of Puerto Rico, claiming that its procedural and substantive due process rights under the Fourteenth Amendment to the United States Constitution had been violated as well as its rights to just compensation pursuant to the Fifth Amendment to the United States Constitution.

Respondents moved to dismiss the complaint. The District Court granted the motion to dismiss

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[1] The Rural Housing Administration, requested and obtained permission to condemn nearby land. Afterwards, Rural Housing Administration, under color of State law, built improvements on the properties belonging to HPY, notwithstanding an injunction granted in favor of HPY prohibiting any further acts to be taken on HPY's land. (App. at ~~A-59~~ A-105).

the complaint on October 7, 1992. In doing so, it held that HPY had not specified with particular certainty its claim under section 1983 and that the complaint failed to satisfy Rule 8 of the Federal Rules of Civil Procedure, on the most basic level.

The Court of Appeals affirmed on essentially the same grounds adding that there was no constitutional violation so long as local law affords a remedy for any tortious misconduct if defendants (here respondents) were not authorized by local law or regulation for their actions. (App at ~~A-3~~ A-4).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY AMONG THE COURTS OF APPEAL THE APPLICABILITY OF WHETHER *CHARLENE LEATHERMAN V. TARRANT COUNTY* APPLIES WHERE A PLAINTIFF PLEADING A

42 U.S.C. § 1983 IS NOT REQUIRED TO PLEAD TO A HEIGHTENED PLEADING STANDARD BASED ON RULE 8(A)(2) AND 9(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner's HPY Inc. filed a 42 U.S.C. § 1983[2] action claiming a violation of their

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[2] 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

By the plain terms of section 1983 **two and only two** allegations are required in order to state a cause of action under the statute:

> 1. **The plaintiff must allege that some person has deprived him of a federal right.**
>
> 2. **The plaintiff must allege that the person who has deprived him of that right acted under color of state or territorial law..**

constitutional rights to Due Process under both the Fourteenth and Fifth Amendments of the United States Constitution.

In the District Court, respondents did not file an answer to HPY's complaint. They moved, instead, for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court granted that motion, pointing out that the court has been "particularly insistent in section 1983 cases to require a fair degree of specificity -- a foundation of material facts -- to survive a motion to dismiss."[3] Further stating that the court found the complaint insufficiently developed to determine whether such federal question jurisdiction exists stating that the complaint fails to satisfy the pleading requirements of Federal Rule of Civil Procedure

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[3] The District Court rested its analysis of the degree of specificity that section 1983 claims should be pled to by using the First Circuit's holdings of *Dewey* v. *University of New Hampshire*, 694 F.2d 1, 3, *cert. denied*, 461 U.S. 944 (1982), and *Gilbert* v. *Cambridge*, 932 F.2d 51, 62, *cert. denied*, 112 S.Ct. 192 (1991).

Rule 8 on the most basic level.

On appeal, a First Circuit panel affirmed the dismissal; it, too relied on the District Courts case analysis and failing to address the issues of due process, summarily addressed the issue of the takings claim pursuant to the Fifth Amendment and relying on *Williamson County*, dismissed the claim until HPY Inc. had first sought just compensation or had exhausted all available state remedies.

For purpose of review of a Rule 12(b)(6) dismissal, the court was required to accept the material facts alleged in the complaint as true,[4] and was not to dismiss "unless it appeared beyond doubt that the plaintiff could not prove no set of facts in support of his claim which would entitle him to relief.[5]"

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[4] *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030,

[5] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Certainly the District Court should not dismiss a complaint without granting leave to amend at least once when a liberal reading of the complaint gives an indication that a valid claim might be stated.[6] The respondents argue that the complaint failed to set forth specific facts to support its general allegations of civil rights violations pursuant to the Due Process Clause of the Fourteenth and Fifth Amendments and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's

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[6] *See Fed. R. Civ. P. 15(a)* (Leave to amend "shall be freely given when justice so requires") 3 Moore's Federal Practice para. 15.08[4], at 15-65 (2d ed. 1990); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222, (1962).

claim is and the grounds upon which it rests.[7]"

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Id. at 2 L.Ed.2d 86.* Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Id.*

The "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by the Federal Rules of Civil Procedure and the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). *Charlene*

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[7] Rule 8(a)(2); *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 85

Leatherman, et al., v. Tarrant County Narcotics Intelligence and Coordination Unit et al., 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).[8]

To the extent Federal Rule of Civil Procedure 8(a)(2) can be construed to require greater factual specificity for a plaintiff's allegations depending on "the nature of the claim" presented, Rule 8(a)(2) violates that part of the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that the Congressional delegation of rulemaking authority to the Supreme Court does not include the power to

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[8] In *Leatherman*, the Supreme Court held that a federal court may not apply a "heightened pleading standard" more stringent than the usual pleading requirements of Federal Rule of Civil Procedure 8(a) in civil rights cases alleging municipal liability under § 1983. Stating further that "it is not possible to square the heightened standard applied in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." And while Rule 9(b) requires greater particularity in pleading certain actions, it does not include among the enumerated actions any reference to complaints alleging municipal liability [or for that matter public corporation liability] under § 1983." 61 LW 4205.

adopt rules that "abridge, enlarge or modify any substantive right."

By imposing solely upon plaintiffs bringing suit under 42 U.S.C. § 1983 the burden of pleading evidence to support their claims prior to discovery, the heightened pleading requirement effectively nullifies, and thereby "abridges," the remedial right provided under Section 1983 when evidence necessary to satisfy the heightened pleading requirement remains in the exclusive possession of a defendant.

Moreover, any assumption that greater specificity was intended under the rules depending on the particular "nature of a claim" is also refuted by the fact that when the drafters wanted to require greater specificity in pleading, they knew how to do it. Rule 9(b) of the Federal Rules of Civil Procedure expressly requires greater factual specificity only for claims alleging fraud or mistake. By

negative implication, it is therefore clear that neither the Advisory Committee, the Supreme Court, nor Congress intended to require that Civil Rights plaintiffs plead their claims with greater factual particularity than other claimants generally.

At the pleading stage, a judge "must guess" whether the plaintiff, if allowed discovery, will be able to gather evidence to support his claims. Uninformed judicial speculation is not an adequate means of arriving at correct decisions on the merits.[9]" In light of the First Circuits affirmance of the District Courts order and its repeated adherence to its standard that section 1983 must be pled specifically[10], The Supreme Court should grant the petition to

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[9] *Marcus*, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 483 (1986).

[10] *Dewey* v. *University of New Hampshire*, 694 F.2d 1,3, *cert. denied*, 461 U.S. 944 (1982); *Gilbert v. Cambridge*, 932 F.2d 51, 62, *cert. denied*, 112 S.Ct. 192 (1991).

resolve a split among the courts of Appeals in light of *Leatherman*.

II. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN *ZINERMON V. BURCH* WHEN HIGH-LEVEL PUBLIC CORPORATION OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF.

HPY's complaint alleged denial of its rights to procedural due process by the former administrators of the Rural Housing Administration, Aqueduct & Sewer Authority, and the Electric Power Authority.

In particular, it claimed the right to a predeprivation hearing prior to the taking of its property. The Court of Appeals decision below relied principally upon *Williamson County* v. *Hamilton Bank*, 473 U.S. 172 (1985). Citing *Williamson County*, the Court of Appeals concluded that HPY "had no constitutional violation so long as local law affords a remedy for any tortious misconduct." (Opinion App. at A-4 ~~A-3~~). The Court of Appeals, however, failed to address the fact that it was the senior officials of the various agencies which induced the agencies themselves, to personally effect the deprivation complained of.

These high-level officials were not only authorized to effect the deprivation complained of[11], but they were also charged with

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[11] Title 22, Chapter 9, Aqueduct and Sewer Authority, § 144(e), Laws of Puerto Rico Annotated. Title 22 Chapter 11, Electric Power Authority § 196(h), Laws of Puerto Rico Annotated. Title 28, Chapter 51, Rural Housing Administration §§ 525, 526, Laws of Puerto Rico Annotated.

responsibility to see that appropriate process was provided to HPY to prevent the deprivation. As such, the Court of Appeals' reliance on *Williamson County* and *Hudson v. Palmer*, 468 U.S. 517 (1985), was misplaced and its decision is inconsistent with the Supreme Court's more recent decision in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990).

At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545,552,85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Ordinarily, due process of law requires an opportunity for some kind of hearing *prior* to the deprivation of a significant property interest. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978) (emphasis added). Only in extraordinary circumstances involving "the necessity of quick action by the State or the impracticality of providing any

[meaningful] predeprivation process" may the government dispense with the requirement of a hearing prior to the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982) (quoting *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S.Ct. 1908, 1914-15 68 L.Ed.2d 420 (1981)).

The Commonwealth of Puerto Rico had given respondents the legislative authority to deprive HPY Inc. of its property provided that they did so by **any lawful means (including, but without limitation, the exercise of the power of eminent domain)**, (emphasis supplied).[12] Respondents, were acting as the State, and since they were in a position to give HPY notice and a hearing, and failed to do so, the State itself was then in a position to provide predeprivation process and

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[12] Title 22, Chapter 9, Aqueduct and Sewer Authority, § 144(e), Laws of Puerto Rico Annotated. Title 22 Chapter 11, Electric Power Authority § 196(h), Laws of Puerto Rico Annotated. Title 28, Chapter 51, Rural Housing Administration §§ 525, 526, Laws of Puerto Rico Annotated.

it too failed to do so.[13]

HPY claims that they are entitled to receive the procedural safeguards provided by Puerto Rico's Eminent Domain Procedure, and that respondents violated HPY's due process rights by failing to initiate this procedure.

In the procedural due process context, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due

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[13] Several Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation, and had the power to provide the plaintiff with a hearing before they did so. *See, Watts v. Burkhart*, 854 F.2d 839, 843 (CA6 1988); *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (CA7 1988); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-1186 (CA11 1987); *Freeman v. Blair*, 793 F.2d 166, 177 (CA8 1986); *Patterson v. Coughlin*, 761 F.2d 886, 891-893 (CA2 1985), cert. denied, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (CA9 1985) (en banc); *Wolfenbarger v. Williams*, 774, F.2d 358, 363-365 (CA10 1985).

process of law. *Zinermon v. Burch*, 494 U.S. at 125, citing *Parratt v. Taylor*, 451 U.S. at 537.

Accordingly, the violation of procedural due process is not complete when the deprivation occurs, and it is does not become complete unless and until the state fails to provide procedural due process. *Id.* To determine whether, as respondents contend, the *Parratt* rule necessarily precludes § 1983 liability in this case, you must ask whether predeprivation procedural safeguards could address the risk of deprivation of the kind HPY alleges. To do this, you examine the risk involved.

The risk is that some persons or agencies who go onto private lands will apparently be taking those lands without first giving notice or an opportunity to be heard to the rightful owners. Indeed, the very nature of the acquisition of private property for public use projects makes it foreseeable that a person or

agency would unlawfully deprive an owner of his property rights without adequate notice. Such a person thus is in danger of losing his property rights indefinitely without benefit of the procedural safeguards of the condemnation process, a process specifically designed to protect land owners of deprivations of their property interests without just compensation.

It may be permissible constitutionally for a state to have a statutory scheme like Puerto Rico's, which gives respondents broad power and little guidance in acquiring private property for public use. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of property, the respondents cannot then escape liability by invoking *Parratt* and *Hudson*. *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. at 988, 108 L.Ed.2d 100 (1990).

The requirements of procedural due process apply only to the deprivations of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property. *Id. at 110 S.Ct. 983.*

In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.[14]

Respondent's cannot escape § 1983 liability by characterizing their conduct as a "random,

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[14] *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. at 987, citing *Loudermill*, 470 U.S., at 452, 105 S.Ct. at 1493; *Memphis Light*, 436 U.S. at 18, 98 S.Ct. at 1564; *Fuentes*, 407 U.S. at 80-84, 92 S.Ct. at 1994-96; *Goldberg*, 397 U.S. at 264, 90 S.Ct. at 1018.

unauthorized" violation of Puerto Rican Law which the Commonwealth was not in a position to predict or avert, so that all the process HPY could possibly be due is a postdeprivation damages remedy.

According to the allegations in the complaint, HPY was deprived of a substantial property interest without either adequate notice or an opportunity to be heard by the very officials charged with the power to deprive landowners of their property and the duty to implement procedural safeguards. Such a deprivation is foreseeable, due to the nature of the taking, and will occur, if at all, at a predictable point in the taking process. *Zinermon v. Burch, 110 S.Ct. at 990.*

Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due

because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged. *Id.*

The interpretation of § 1983 articulated in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (overruled in part not relevant here, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 664-689, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)), stated that the Supreme Court had rejected the view that § 1983 applied only to violation of constitutional rights that were authorized by state law, and did not reach abuses of state authority that were forbidden by the State's statutes or Constitution, or were torts under the State's common law.

It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violation of civil rights "where

state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." *Id.*, at 173-174, 81 S.Ct., at 476-77.[15]

Section 1983 does, however, protect against the deprivation of a property interest "whenever the State seeks to remove or significantly alter" the status of liberty or property interests recognized by state law.[16] Additionally, there are other interests, of course, protected not by the virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been

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[15] The Court said: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*, at 183, 81 S.Ct., at 481. Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.

[16] *San Jacinto Sav. & Loan* v. *Kacal*, 928 F.2d 697, 701 (CA5 1991).

'incorporated'into the Fourteenth Amendment.

Section 1983 makes a deprivation of such rights actionable independent of State law.[17]

Predeprivation process was not impossible here. Puerto Rico has a procedure for the taking of land, but only the highest officials of the respondent agencies are in a position to take notice of any misuse of the delegated eminent domain power and to ensure that the proper procedures are afforded to those landowners whose land is adversely affected by the taking.

In addition, respondent's conduct was not unauthorized within the meaning of *Parratt* and *Hudson*, since the Commonwealth of Puerto Rico had delegated to these agencies the power and authority to deprive landowners of their

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[17] *Id.* at p. 710 n. 5, 96 S.Ct. at 1165 n. 5 (citing *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)).

property and the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful takings. *Zinermon v. Burch*, 494 U.S.113, 110 S.Ct. 975, 977 (1990).

Petitioner submits that *Hudson & Williamson County* are inapposite and that an analysis indicated by *Zinermon* should govern situations such as the one presented in the case below. The petition should be granted to clarify the requirements of procedural due process in predeprivation takings to the extent to which the *Zinermon* analysis has narrowed *Hudson* with respect to the denial of procedural due process by high-level officials.

III. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE COURT OF APPEALS ON THE ISSUE OF WHETHER SUBSTANTIVE DUE PROCESS CLAIMS AND TAKINGS CLAIMS SHOULD NOT

BE HELD TO THE SAME RIPENESS STANDARD AS OUTLINED IN *WILLIAMSON COUNTY*.

Petitioner alleged that the respondents violated its rights to substantive due process when through the Rural Housing Administration, Aqueduct & Sewer Authority and the Electric Power Authority, arbitrarily and capriciously provided utility service and other structures to squatters which had invaded HPY's land. The First Circuit Court of Appeals relied principally on the rationale of *Williamson County* to review the ripeness of the claim before it's court.

The First Circuit Court of Appeals erroneously applied a *Williamson County* ripeness standard with respect to the claims presented to the District Court and then to those issues presented on appeal.[18] The First Circuit Court

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[18] This Court held that there were two ripeness requirements, finality and exhaustion of available state remedies.

of Appeals decided that HPY had to exhaust all available state remedies prior to bringing the case to Federal District Court. However, the District Court dismissed the action with prejudice as to our claim under 42 U.S.C. § 1983 but failed to address the issues of substantive and procedural due process. Based on this, the First Circuit Court of Appeals affirmed the decision of the District Court and then erroneously applied a *Williamson County* ripeness standard. The error therein lies with treating substantive due process and procedural due

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Finality, is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete type injury. *Williamson County*, 473 U.S. at 193. However, regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant government body. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F. 2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). The second requirement, exhaustion of available state compensation remedies, states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking. *Id.* The Supreme Court held in *Williamson* that the issues of Procedural Due Process and Substantive Due Process were not issues before the Court. 473 U.S. at 195-96 n. 14, 105 S.Ct. at 3121 n. 14

process claims with those of takings claims pursuant to the Fifth Amendment to the U.S. Constitution. It is possible for Due Process claims and Takings Claims to emanate from the same set of facts, but to hold the Due Process Claim to the second prong of the Takings Claim as discussed in Williamson is unjustifiable.

Indeed, the Supreme Court in *Williamson County* expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of post-deprivation remedies. *See Williamson County* 473 U.S. at 195-96 n. 14, 105 S.Ct. at 3121 n. 14.

In *Williamson County*, the Supreme Court applied the finality prong of the ripeness analysis, just as it had for the just compensation claim. This rationale is not applicable to an as applied arbitrary and capricious due process claim. Such a claim

regarding a property owners rights have been violated the moment the government acts in an arbitrary manner and that arbitrary action is applied to the owners property. *Greenbriar v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989). Even if the government pays just compensation, a property owners rights are violated the moment a governmental decision affecting his property has been made in an arbitrary and capricious manner. Id. at 1574.

The first ripeness prong of *Williamson County* (requirement of final decision), while applicable to most substantive due process claims arising out of alleged regulatory takings is not relevant to a physical taking claim because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation. *Sinaloa Lake 882 F.2d 1398* at 1407.

State post-deprivation remedies are of no consequence in the context of substantive due process actions brought under § 1983. Substantive due process violation, unlike procedural due process violations, are complete when the wrongful action is taken. *Zinermon v. Burch*, 494 U.S. at 125. A plaintiff "may invoke § 1983 regardless of any state tort remedy that might be available to compensate him for the deprivation of these [substantive due process] rights." *Id.*, (citing *Monroe v. Pape*, 365 U.S. 167 (1961)). Thus, any suggestion that state post-deprivation remedies obviate a substantive due process claim is clearly erroneous.

If government action constitutes a permanent physical occupation of property, there is "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

435-35, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982)[19]. This type of taking, requiring courts to apply a per se rule, has been termed a "physical taking," *see Yee v. City of Escondido* 112 S.Ct. 1522, 1527, and stands in contrast to the fact intensive inquiry accompanying a judicial determination of whether a "regulatory taking" has occurred.

On a general level, substantive due process protects against arbitrary government conduct. *United States v. Certain Real Property*, 954 F.2d 29, 33 (2d Cir.) (citing *Daniels v. Williams*, 474 U.S. 327, 331, 88 L.Ed.2d 662, 106 S.Ct. 662

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[19] *Loretto* helps to define what constitutes a physical taking. In *Loretto*, the Court reviewed a New York law that required a landlord to permit a cable company to install cable equipment on his building. The Court held that the permanent cable installation on the landlord's building was a permanent appropriation of a portion of the landlord's property and, therefore, constituted a physical taking, even though it displaced only approximately one-half of a cubic foot of property. *Loretto*, 458 U.S. at 438 & n. 16. The *Loretto* Court explained that a permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. *Id.*

(1986)), petition for cert. filed (April 20, 1992).

Because *Williamson County* involved a takings claim but not a substantive due process claim, lower courts faced with both a takings claim and substantive due process claim based on property have had to determine the applicability of the *Williamson County* just compensation requirement to substantive due process claims without explicit guidance from the Supreme Court. In particular, the Courts of Appeals for the First and Ninth Circuits have addressed this issue and reached different results.[20] The most

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[20] The Ninth's Circuit's approach to the just compensation issues can be seen in two cases, *Sinaloa Lake owners Association v. City of Simi Valley*, 882 F.2d 1398 (Ninth Circuit 1989), *cert. denied* sub nom. *Doody v. Sinaloa Lake Owner's Association*, 110 S.Ct. 117 (1990).; and *Bateson v. Geisse*, 857 F.2d 1300 (Ninth Circuit 1988). In each case, property owners alleged that a particular governmental act constituted both a taking and a deprivation of substantive due process. In both cases the plaintiffs had not pursued just compensation at the state level for either their takings or their substantive due process claim. Both courts ruled that, because the plaintiffs had not sought just compensation, the takings claims were unripe under the just compensation requirement of

obvious problem with requiring that a litigant pursue just compensation in order to have a ripe substantive due process claim is that there seems to be no basis for such a rule in the language of the Fourteenth Amendment.[21] The takings clause of the Fifth Amendment specifically refers to just compensation; the due process clause of the Fourteenth Amendment

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Williamson County. The courts also ruled, though, that the substantive due process claims were ripe because substantive due process claims are not subject to the just compensation requirement.

The First Circuit's holding in *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987) and *Ochoa Realty Corp. v. Faria*, 815 F.2d 812 (1st Cir. 1987) also involved plaintiffs who claimed that certain acts by the government had both violated their substantive due process rights and amounted to a taking without just compensation. In these cases, the First Circuit held that both claims were not ripe because the plaintiffs had not sought just compensation in state proceedings. The *Culebras* holding (which the court quoted and followed in *Ochoa*) stated that "there can be no violation of substantive due process...at least until the state inverse condemnation proceeding is resolved." See *Culebras* at 516; see also *Ochoa* at 817 n.4. Thus, the First Circuit requires that, in order for a plaintiff to have a ripe substantive due process claim, he must first pursue just compensation at the state level.

[21] U.S. Constitution, 14th Amendment § 1.

does not include any language about compensation. The first portion of each clause outlines a governmental power, namely, the power to deprive of life, liberty, or property and the power to take land; and the second portion of each clause places a limitation on that power, namely, that life, liberty or property can be deprived only if there is due process of law, and that land can be taken only if just compensation is given. There is no requirement that due process be violated for a taking to occur, nor that just compensation be denied for a deprivation of life, liberty, or property to occur. Just compensation is thus relevant to a taking but irrelevant to a deprivation of substantive due process.

There is also a danger of preclusion under the First Circuit's approach: state rulings on substantive due process might have a preclusive effect, thereby denying HPY a federal forum for their federal claim. Under 28 U.S.C. § 1738,

the federal courts are bound by a state determination and cannot hear a given claim if the state accords a preclusive effect to its adjudication of that claim.[22]

Because the Supreme Court has ruled that section 1983 is not an exception to 28 U.S.C. § 1738[23], state adjudication of a section 1983 claim has the same preclusive effect in federal court as it would in a state court. Furthermore, the Supreme Court has held that, regarding section 1983 claims, federal courts "must give [administrative] factfinding the same preclusive effect to which it would be entitled in the State's courts.[24]" Thus, if a state court adjudicates a given claim and assigns a

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[22] For a delineation of the elements of preclusion (and of the bases for a court's assigning preclusive effect to its adjudication), see W. FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL 11-30 (1988).

[23] See *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980).

[24] *University of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986).

preclusive effect to its determination, the federal courts are bound by that decision and cannot hear the claim, even if the proceeding was merely an administrative hearing.

Because the First Circuit's approach potentially deprives HPY of the ability to enter federal court, it prevents the effectuation of concurrent jurisdiction. The Supreme Court has interpreted section 1983 to provide for concurrent jurisdiction in the federal and state courts over constitutional claims.[25] Thus a plaintiff with a ripe section 1983 claim should be able to choose whether to bring his claim in state or federal court.

If, however, a state's preclusion rules prevent a plaintiff from entering federal court after a state proceeding, then the plaintiff has been denied his choice of forum. Irrespective

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[25] *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961).

of the state courts' adequacy to hear substantive due process claims, sending such claims to state courts prevents plaintiffs from exercising the choice that is the basis of concurrent jurisdiction.

Section 1983 was written specifically to avoid such a result by ensuring that a federal forum would be accessible.[26] Thus, insofar as a requirement that a plaintiff utilize state proceedings prevents the plaintiff from entering federal court with federal claims, the requirement frustrates the purpose of section 1983 by denying concurrent jurisdiction.[27]

Another problem with the First Circuit's

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[26] See *Monroe*, 365 U.S. at 183 ("The federal remedy [under section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.")

[27] It is plaintiffs, not defendants, who choose between state and federal fora when there is concurrent jurisdiction. But when a plaintiff's claims are sent to a forum that he did not choose, he has been denied the choice of forum that is inherent in concurrent jurisdiction.

rule is that the opinions in *Culebras* and *Ochoa* do not articulate any criteria that would allow only property-based substantive due process claims to be sent to state court. Their failure to distinguish among substantive due process claims suggest that all rights protected by that clause, including life and liberty, could be deprived as long as the state gives just compensation. This is too dramatic of an undertaking merely because of a desire to raise the ripeness requirements for takings-related substantive due process claims.

Sending substantive due process claims to state courts does not comport with the Constitution and frustrates its precepts: under the Fourteenth Amendment and section 1983 federal courts are open to plaintiffs who are aggrieved by states, and if courts fabricate constitutional doctrines to avoid such plaintiffs, they have violated the spirit of the Constitution.

Therefore, the Supreme Court should grant the petition to resolve the split of authority differentiating the ripeness of substantive due process claims with those of takings claims.

IV. THE PETITION SHOULD BE GRANTED TO CLARIFY AN ERRONEOUS APPLICATION OF WILLIAMSON COUNTY TO A TAKINGS CLAIM WHERE ALL AVAILABLE STATE REMEDIES HAD BEEN EXHAUSTED.

HPY's complaint also alleged a deprivation of its property without just compensation pursuant to the Fifth Amendment of the United States Constitution. The Court of Appeals' decision below was thus properly premised on an analysis of *Williamson County*.

The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation...all that is required is that

a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. *Williamson*, 105 S.Ct. at 3121. The Court went on to analogize to *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), its holding that a property owner has not suffered a violation of the just compensation clause until after the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state.

In *Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172*, the United States Supreme Court held that a takings case is not ripe for federal court litigation until compensation has first been sought and refused in state courts, if the state courts will consider an action for compensation. The Supreme Court held in *Williamson County* that if a State provides an adequate procedure for seeking just compensation, the property owner

cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County places two hurdles in the way of a takings claim brought in federal court against states and their political subdivisions. First, *Williamson County* affirmed the principle that "a claim that the application of government regulation effects a taking of property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Id. at 186, 105 S.Ct. at 3116.*

The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts." *Id. at 194-95, 105 S.Ct. at 3120-21.*

The complaint and subsequently the record on appeal to the First Circuit Court of Appeals clearly stated that HPY had first sought an intervention on a state condemnation claim because adjoining property to that of HPY had also been invaded by squatters; said intervention was denied.[28] Subsequent to the denial, an eviction proceeding was conducted in the Superior Court of Ponce, Puerto Rico, and it was there that the court rendered a judgment in favor of HPY.[29] However, because HPY land had been developed by the respondents to such an extent that it was impracticable to remove the

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[28] App. at ~~A-35~~ A-58.

[29] App at ~~A-59~~ A-105. A Judgment was rendered on June 4, 1991 by the Superior Court of Ponce, Puerto Rico, which stated:

> "all defendants and all others who had constructed structures had to **CEASE AND DESIST** from hindering the plaintiffs from the possession of the property which was the subject of litigation." (emphasis original)

The judgment was published in a newspaper of general circulation on June 6, 1991 and mailed to The Secretary of the Department of Housing Administration. (App at ~~A-61~~ A-108).

individual squatters one by one, HPY filed an inverse condemnation claim against the Commonwealth of Puerto Rico.

On the belief that the Commonwealth of Puerto Rico would include HPY in its expropriation proceedings, HPY requested a voluntary dismissal of its inverse condemnation claim without prejudice, which was granted by the Superior Court of Ponce, Puerto Rico but was granted with prejudice.

Thus having been denied intervention after HPY received a voluntary dismissal of its inverse condemnation claim with prejudice effectively precludes HPY's ability to request just compensation for land which was taken by respondents in direct violation of the Fifth Amendments Taking Clause. Therefore, HPY has effectively satisfied both prongs of *Williamson County* because a physical taking by the respondents, such as the one at issue here, is

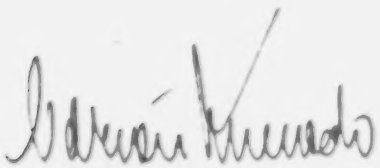
by definition a final decision. The fact also that HPY has sought and been denied every available state remedy affirmatively demonstrates that HPY had exhausted all available state remedies and it was error for the First Circuit Court of Appeals to affirm a decision of the District Court when a careful inspection of the record on appeal and a liberal reading of the complaint would have shown this as so.

The Supreme Court should grant the petition to clarify an erroneous application of *Williamson County* in cases where all available state remedies have been exhausted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2370

HPY, INC.
Plaintiff-Appellant.

v.

AUTHORITY OF ELECTRIC POWER, ET AL
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Cyr, Circuit Judge,
Boudin, Circuit Judge,
and Burns, Senior District Judge.

Francisco J. Amundaray-Rodriguez, Mirta E. Rodriguez-Mora, Attorney, Department of Justice, Adrian Mercado and Mercado & Soto on brief for appellant. Reina Colon De Rodriguez, Acting Solicitor General, Department of Justice, Carlos Lugo Fiol, Assistant Solicitor General, Department of Justice, Arturo Trias, Miguel R. Garay Auban, Pedro Santiago-Torres, Jorge Marrero Narvaez, and Trias, Acevedo & Otero on brief for appellees.

April 15, 1993

* Of the District of Oregon, sitting by designation

Per Curiam. HPY, Inc., brought this action under 42 U.S.C. § 1983 against three public authorities in Puerto Rico, certain of their officials, and John Does 1 through 1,000. The agencies are the Electric Power Authority, the Puerto Rico Aqueduct and Sewer Authority and the Rural Housing Administration. The heart of the complaint was the following allegation:

> "On or about 1985, squatters, without valid title or authorization from the plaintiff started massive land invasions on said properties [belonging to plaintiff]. The squatters, also Defendants of [sic] this suit, encouraged and abetted by the other Defendants, proceeded to construct or build shacks and houses on Plaintiff's properties."

This, said the complaint, comprised a deprivation of property rights "without due process and without due compensation."

The defendants moved to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). In opposing the motion, HPY offered

a few more factual allegations. Specifically, it alleged that squatters had occupied its land and that some or all of the named defendants had encouraged the invasion and abetted the squatters by supplying public facilities like power to the squatters and even constructing or assisting the squatters to construct shacks. The district court ultimately dismissed the complaint, with prejudice, for failure to state a claim, observing that "we are as likely to squeeze blood from a stone as we are to squeeze any more facts from this complaint . . . ." HPY appeals.[1]

We affirm the district court. Section 1983 creates a claim for injuries done by anyone who "acting under color of" state law deprives the victim of any "rights, privileges, or immunities" protected under the Constitution.

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[1] After filing its brief with this court, HPY filed two informative motions. One motion amended a page reference included in its brief; the second provided us with supplemental support for its argument. We grant both motions.

The original complaint did not explain what the named defendants had done under color or state law, but we will take the complaint on this appeal as illuminated by HPY's oppositions to the motions to dismiss. Even in this posture, and allowing HPY the benefits of liberal pleading rules, 5 Wright & Miller, Federal Practice and Procedure § 1219 (1990), we cannot see how HPY can premise a claim under section 1983 upon the facts alleged.

We will assume arguendo that the color of state law requirement is met as to the named defendants (since they are governmental entities and officials) and that HPY's property has been physically occupied and its value diminished. But if the actions of the named defendants are not authorized by local law or regulation, then there is no constitutional violation so long as local law affords a remedy for any tortious misconduct. Hudson v, Palmer, 468 U.S. 517, 533 (1984) (unauthorized property

seizure of state employees not a constitutional deprivation is state remedy afforded). Defendants assert that there is a remedy under local law, 32 L.P.R.A. § 3077.

HPY neither alleged the absence of such a remedy in the complaint nor countered defendants' assertion in this court (HPY did not file a reply brief.

Alternatively, if HPY is alleging that the abetting of the trespass is authorized by Puerto Rican law, conceivably a taking claim would arise and the Constitution would require compensation. But again there is no constitutional deprivation so long as Puerto Rico provides an appropriate remedy to secure compensation for takings. Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985). Once again, the defendants assert that such a remedy exists under Puerto Rican law, see Culebras Enterprises Corp. v. Rivera

Rios, 813 F. 2d 506, 513 (1st Cir. 1987), and once again there is no contrary allegation in the complaint and no counter to defendants' assertion by way of reply brief.

HPY also complains that the dismissal should have been without prejudice in light of the liberal leave-to-amend policies followed by the courts. Here, however, HPY filed an utterly uninformative complaint. We have effectively treated the additional material scattered in its three oppositions filed in the district court as amendments to the complaint. Even so, HPY has still failed to state a claim, nor has it filed a reply in this court responding to the authorities just recited (which were set forth in the answering briefs). Accordingly, we do not think that the dismissal with prejudice represents an abuse of discretion.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-2370

HPY, INC.,

Plaintiff-Appellant,

v.

ELECTRIC POWER AUTHORITY, ET AL.,

Defendants-Appellees.

JUDGMENT

Entered: April 15, 1993

This cause came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO

Clerk

[cc: Mr. Amundaray-Rodriguez and Ms. Colon De Rodriguez]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-2370

HPY, INC.

Plaintiff, Appellant.

v.

AUTHORITY OF ELECTRIC POWER, ET AL

Defendants, Appellees.

BEFORE

CYR, Circuit Judge,

BOUDIN, Circuit Judge,

and BURNS*, Senior District Judge.

A-10

ORDER OF COURT

Entered May 11, 1993

Upon consideration of Appellant's petition for rehearing,

It is ordered that said petition be denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk

(cc: Messrs. Rodriguez Mora, Soto-Balbas, Mercado, Garay Auban)

(cc: Messrs. Trias, Lugo Fiol, Marrero Narvaez)

(cc: Messrs. Santiago Torres, Amundaray-Rodriguez)

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* Of the District of Oregon, sitting by designation

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

HPY, INC. Plaintiff.	*	Civil No. 92-1522 (JAF)
v.	*	
PUERTO RICO ELECTRIC POWER AUTHORITY; JOSE A. DEL VALLE; PUERTO RICO AQUEDUCT AND SEWER AUTHORITY; ENG. MARIA MARGARITA IRIZARRY; RURAL HOUSING ADMINISTRATION; GAMALIER RODRIGUEZ MERCADO, et al Defendants.	*	

JUDGMENT

Pursuant to the terms of an Order announced by the court today, judgment is now entered dismissing the complaint with prejudice.

This case is now closed for all purposes.

Concord, New Hampshire, this 7th day of October, 1992.

JOSE ANTONIO FUSTE
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

HPY, INC. Plaintiff.	* Civil No. 92-1522 (JAF)
v.	*
PUERTO RICO ELECTRIC POWER AUTHORITY; JOSE A. DEL VALLE; PUERTO RICO AQUEDUCT AND SEWER AUTHORITY; ENG. MARIA MARGARITA IRIZARRY; RURAL HOUSING ADMINISTRATION;GAMALIER RODRIGUEZ MERCADO,et al, Defendants.	*

OPINION AND ORDER

Plaintiff, a Delaware corporation, brings suit under 42 U.S.C. §§ 1983 and 1985, for violation of its due process and property rights under the fourteenth amendment to the United States Constitution. The complaint alleges jurisdiction under 28 U.S.C. § 1343. Plaintiff also asserts jurisdiction under 28 U.S.C. § 1331; however, we find the complaint insufficiently developed to determine whether such federal question jurisdiction exists. Gully v. First National Bank, 299 U.S. 109 (1936). Before the court are

several motion to dismiss by codefendants Rural Housing Administration, Docket Document No. 14; Puerto Rico Aqueduct and Sewer Authority, Docket Document No. 15; Gamalier Rodriguez Mercado, Docket Document No. 19, and Maria Margarita Irizarry, Docket Document No. 16.

We dismiss the complaint for failure to state a cause of action upon which relief can be granted.

Facts

Plaintiff alleges that the defendant agencies, the Electric Power Authority, the Aqueduct and Sewer Authority, and the Rural Housing Administration, acted in violation of their rules and regulations by conspiring with other unnamed defendants to deprive plaintiff of its property rights. The precise wrongful act cannot be discerned from the complaint. However, we surmise that such conduct may have been the

supplying of power and water service to squatters in HPY, Inc., land. Plaintiff submitted with the complaint a Writ for the Execution of Judgment, issued by the Superior Court in Ponce, on March 26, 1992. Although a writ for execution of judgment is an unusual document to prove title to land, the writ establishes the plaintiff's title to the land and gives it the right to eject the present illegal occupants. However, we are unable to establish the connection of the unnamed defendants to the defendant agencies. Since we are as likely to squeeze blood from a stone as we are to squeeze any more facts from the complaint, we dismiss this action.

Fed. R. Civ. P. 8

The complaint fails to satisfy the pleading requirement of Fed. R. Civ. P. 8 on the most basic level. As aptly characterized by the First Circuit, "[i]n the menagerie of the Civil

Rules, the tiger patrolling the courthouse gates is rather tame, but 'not entirely . . . toothless.'" Correa-Martínez v. Arrillaga-Beléndez, 903 F.2d 49, 52 (1st Cir. 1990) (citing Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989). While under Fed. R. Civ. P. 12(b)(6) we must give plaintiff's complaint a highly deferential reading, construing all facts in its favor, International Paper Company v. Jay, 928 F.2d 480, 482 (1st Cir. 1991); González-Bernal v. U.S., 907 F.2d 246, 248 (1st Cir. 1990), this "rule does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory description of 'a general scenario which could be dominated by unpleaded facts.'" Correa-Martínez v. Arrillaga-Beléndez, 903 F.2d at 53 (citing Dewey v. Univ. of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983). The pleading must give the court a fair idea of plaintiff's complaint so that it may see if there is some legal basis for

recovery. Moore's Federal Practice § 8.13 at 8-73 (1992). Fed. R. Civ. P. 8(f) requires that "[a]ll pleadings shall be so construed as to do substantial justice." That means substantial justice for both parties. A claim such as this one, which is so lacking in substance, does an injustice to the defendants.

In this complaint, we have no indication of what actually occurred. Plaintiff incorporates a judgment from the Superior Court in Ponce into the complaint. However, this judgment informs us of little other than that plaintiff is part owner of the named properties and that there are individuals illegally occupying the property. The complaint's only substantive allegation is that the squatters ejected by the state court judgment were "encouraged and abetted" by the defendant agencies in building shacks and houses. There are no facts to support this allegation. And the allegation itself is not even a fact, but rather a conclusion which needs

facts to make any sense out of it.

Plaintiff is bringing suit under sections 1983 and 1985. The First Circuit has stated that, where plaintiff is alleging the violation of the civil rights statutes, "we insist that the claim at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir.), cert. denied, 461 U.S. 944 (1982); Gilbert V. Cambridge, 932 F.2d 51,62 (1st Cir.), cert. denied, 112 S. Ct. 192 (1991) ("We have been particularly insistent in section 1983 cases to require a fair degree of specificity -- a foundation of material facts -- to survive a motion to dismiss.").

The First Circuit also requires that in complaints under the civil rights statutes that allege conspiracy, such as plaintiff alleges under section 1985, "some factual basis supporting the existence of a conspiracy must be

pled when a conspiracy is alleged in a civil rights case." Glaros v. Perse, 628 F.2d 679 (1st Cir. 1980); Francis-Sobel v. University of Maine, 597 F.2d 15, 17 (1st Cir.), cert. denied, 444 U.S. 949 (1979); Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978). This complaint does not set forth any facts, let alone minimal facts. The plaintiff has not established any connection between the defendant agencies and a violation of plaintiff's civil rights. No action under 42 U.S.C. §§ 1983 and 1985 can be sustained on the basis of such an empty complaint.

Conclusion

We grant defendants' motions to dismiss. Judgment shall be entered dismissing the complaint.

IT IS SO ORDERED.

Concord, New Hampshire, this 7th day of October, 1992.

JOSE ANTONIO FUSTE

U. S. District Judge

IN THE UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

	*
HPY, INC.	*CIVIL NO.:
PLAINTIFF	*
	*CIVIL RIGHTS ACTION
VS.	*INJUNCTIVE RELIEF
	*DAMAGES AND PUNITIVE
ELECTRIC POWER AUTHORITY	*DAMAGES SOUGHT
JOSE A. DEL VALLE;	*
AQUEDUCT AND SEWER	*
AUTHORITY, ING. MARIA	*PLAINTIFF DEMAND
MARGARITA IRIZARRY;	*
RURAL HOUSING	*TRIAL BY JURY
ADMINISTRATION; GAMALIER	*
RODRIGUEZ MERCADO;	*
JOHN DOE 1 Through 1,000	*
DEFENDANTS	*
**********	

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW, Plaintiff, through its undersigned attorneys and before this Honorable Court respectfully state, allege and pray:

I. JURISDICTION OF THIS COURT

1. This is an action under 42 USCA sections 1983-1985 (Federal Civil Rights Act) seeking

injunctive relief against the unreasonable, oppressive, abusive and discriminatory use of powers allegedly conferred by state law to the above named Defendants. The jurisdiction of this Court is invoked under said 42 USCA Sections 1983-1985 on the grounds that the actions and conduct of the above named Defendants under color of state law have deprived Plaintiff of its Constitutional Property Rights without the substantive and procedural due process of law guaranteed to Plaintiff by the Constitution of the United States of America. Jurisdiction of this Court is also invoked under 28 USCA sections 1331 and 1343, since this action arises under the Fifth and Fourteenth Amendments of the Constitution of the United States of America, and wherein the matter in controversy exceeds the sum of fifty thousand dollars ($50,000.00) exclusive of interest and cost.

2. Relief is also sought in the form of damages as against the aforesaid Defendants under the aforesaid 42 USCA Sections 1983-1985 and the Fifth and Fourteenth Amendments of the Constitution of the United States of America and denial of substantive and procedural due process.

II. PARTIES TO THE ACTION

3. Plaintiff is a citizen of the United States of America and is incorporated in the State of Delaware.

4. Defendant **ELECTRIC POWER AUTHORITY** is a public corporation having a judicial personality separate and apart from that of the Commonwealth of Puerto Rico, is made a party to this complaint because in the capacity stated hereinabove, acting under color of state law engaged in unlawful, illegal, discriminatory and abusive acts, which have deprived Plaintiff of its property without substantive and procedural

due process of law, by ignoring its own rules and regulations and the law that created it, all of which acts and actions are contrary to the Constitution of the United States of America.

(4a) Defendant José A. Del Valle is the Executive Director of the Electric Power Authority who under color of State Law violated Plaintiff's Civil Rights and continuously denied plaintiff of substantive and procedural due process as guaranteed by the U.S. Constitution.

5. Defendant **AQUEDUCT AND SEWER AUTHORITY** is a public corporation having a judicial personality separate and apart from that of the Commonwealth of Puerto Rico, is made a party to this complaint because in the capacity stated hereinabove, acting under color of state law engaged in unlawful, illegal, discriminatory and abusive acts, which have deprived Plaintiff of their property without substantive and procedural due process of law, by ignoring its

own rules and regulations and the law that created it, all of which acts and actions are contrary to the Constitution of the United States of America.

(5a) Defendant **ING. MARIA MARGARITA IRIZARRY** is the Executive Director of the **AQUEDUCT AND SEWER AUTHORITY** who under color of State Law violated Plaintiff's Civil Rights and continuously denied plaintiff of substantive and procedural due process as guaranteed by the U.S. Constitution.

6. Defendant **RURAL HOUSING ADMINISTRATION** is a public entity having a judicial personality separate and apart from that of the Commonwealth of Puerto Rico, is made a party to this complaint because in the capacity stated hereinabove, acting under color of state law engaged in unlawful, illegal, discriminatory and abusive acts, which have deprived Plaintiff of their property without substantive and procedural due process of law, by ignoring its

own rules and regulations and the law that created it, all of which acts and actions are contrary to the Constitution of the United States of America.

(6a) Defendant **GAMALIER RODRIGUEZ MERCADO** is the Executive Director of the **RURAL HOUSING ADMINISTRATION** who under color of State Law violated Plaintiff's Civil Rights and continuously denied plaintiff of substantive and procedural due process as guaranteed by the U.S. Constitution.

(6b) Defendants **John Doe 1 through 1,000** are those persons as yet unknown, who violated Plaintiff's Civil Rights and together with the other defendants mentioned before deprived plaintiff of their property rights and property in violation of their substantive and procedural rights guaranteed by the U.S. Constitution under the Fifth and Fourteenth Amendment.

III. CAUSE OF ACTION

7. Plaintiff is the owner of a series of parcel of lands (hereinafter referred to as the "Properties"), of which in the Registry of the Property of Puerto Rico are described in the Spanish language as follows:

> -----(A)-----RÚSTICA: Parcela de terreno que radica en el Barrio Canas del término municipal de Ponce, Puerto Rico, con un área superficial de VEINTISÉIS PUNTO SEIS MIL SETECIENTOS VEINTE CUERDAS, equivalentes a CIENTO CUATRO MIL OCHOCIENTOS CUARENTA PUNTO TRES MIL OCHOCIENTOS OCHENTA Y TRES METROS CUADRADOS (104,840.3883. Colinda por el Norte con parte de la finca principal en dos direcciones de la cual se segregó las noventa cuerdas de las que la presente es un resto, propiedad de la Sindicatura de la Sociedad Mario Mercado e Hijos, en una distancia la primera dirección de novecientos cincuenta y seis punto quince metros, y la segunda dirección en una distancia de doscientos setenta y tres punto cuatrocientos noventa y seis metros; por el Sur y en una sola dirección y distancia de mil ciento ochenta y ocho punto seiscientos setenta metros con la parcela descrita con la Letra "E" en el plano levantado por el Ingeniero Rafael Dosal Lines; por el Este, en

una sola dirección y distancia de tres punto quinientos setenta y cuatro metros, con la Urbanización Punto Oro; por el Oeste, en una sola dirección y distancia de ciento dos punto ochenta y cinco metros con terrenos de finca principal conocida por Hacienda Matilde, propiedad de la Sindicatura de la Sociedad Mario Mercado e Hijos y de la cual se segregó la parcela de cincuenta cuerdas de la cual éste es resto. Esta parcela está marcada "A" en el plano de segregación levantado por el Ingeniero Rafael Dosal Lines.--------

-----La parcela aquí descrita es el resto de la de este número luego de deducirse de su cabida de noventa cuerdas las parcelas segregadas y que indican las notas al margen de la anterior inscripción primera.

-----Finca: antes número 35,564 de Ponce I, hoy la número 5868 de Ponce II, aparece descrita al folio 165 vuelto del tomo: antes 1263 de Ponce I, hoy 521 de Ponce II. ("PROPIEDAD HPY -A").

-----(B)-----RÚSTICA: Parcela de terreno que radica en el Barrio Canas del término municipal de Ponce, Puerto Rico, con una cabida de ONCE PUNTO SEIS MIL SEISCIENTOS SESENTA Y SEIS CUERDAS iguales a CUARENTA Y CINCO MIL OCHOCIENTOS CINCUENTA Y CUATRO PUNTO CUATRO MIL CUARENTA Y SEIS METROS CUADRADOS (45,854,4046), en lindes por el Norte, con una parcela identificada con la letra (A) en el plano de segregación levantado por el Ingeniero Rafael Dosal Lines, o sea, con más terrenos de la parcela

de noventa cuerdas, de cuyo resto, se segrega esta parcela, siendo dicha colindancia una sola alineación de mil ciento cincuenta y cinco punto trescientos cincuenta (1,155.350) metros; por el Sur, en una sola alineación de mil ciento treinta y nueve punto trescientos ochenta y siete metros, colinda con terrenos segregados de la parcela de noventa cuerdas identificada como Parcela "B" en el plano levantado por el Ingeniero Rafael Dosal Lines antes referido; por el Este, en una sola alineación de cuarenta punto quince metros colinda con la Urbanización Punto Oro; y por el Oeste en una sola alineación de cuarenta y uno punto quinientos cuatro metros, colinda con más terrenos de la finca principal conocida por Hacienda Matilde, propiedad de la Sociedad Mario Mercado e Hijos.

-----Finca: antes 43,077 de Ponce I, hoy la número 5869 de Ponce II, aparece descrita al folio 111 del tomo: antes 1440 de Ponce I, hoy el 598 de Ponce II. ("PROPIEDAD HPY-B").

-----(C)-----RÚSTICA: Predio de terreno que radica en el Barrio Canas del término municipal de Ponce, Puerto Rico, con una cabida superficial de CIENTO ONCE MIL TRESCIENTOS CUARENTA Y SIETE METROS CUADRADOS CON CINCUENTA Y CINCO CENTÍMETROS DE OTRO (111,347.55) equivalentes a VEINTE Y OCHO CUERDAS CON TRES MIL TRESCIENTOS TREINTA Y TRES MILÉSIMAS DE OTRA (28,3333) colindando por el Norte, con las restantes sesenta y uno punto seis

mil seiscientos sesenta y siete cuerdas de las noventa cuerdas originales, en una distancia de mil ciento treinta y nueve punto quinientos ochenta y siete metros (1,139,587) y un rumbo de setenta y ocho grados cuarenta y seis minutos y cincuenta y cuatro segundos Norte al Este. Por el Sur, con terrenos de la Urbanización Punto Oro en una distancia de mil noventa y cinco punto seiscientos y diez y ocho metros (1,095.618) a un rumbo de setenta y ocho grados cincuenta y siete minutos con cincuenta y tres segundos Sur al Oeste. Por el Este, con terrenos de la Urbanización Punto Oro, en una distancia de sesenta y cinco punto novecientos treinta y ocho metros (65.938) con un rumbo de cuatro grado, dos minutos y tres segundos Sur al Este, y una distancia de treinta y siete punto cero setenta y dos metros (37.072), con un rumbo de tres grados, cuarenta y un minutos y cuarenta y siete segundos Sur a Oeste. Por el Oeste, con terrenos de la finca principal conocida por Hacienda Matilde, propiedad de la Sociedad Mario Mercado e Hijos de donde se segregó la parcela de noventa cuerdas de la cual la parcela que aquí se describe es segregación en una distancia de ciento uno punto ciento ochenta y cinco metros (101.185) con un rumbo de viente y seis grados, tres minutos y siete segundos Norte al Oeste.

-----Finca: antes número 39,436 de Ponce I, hoy la número 5867 de Ponce II, aparece descrita al folio 115 del tomo: antes 1374 de Ponce I, hoy el 578 de Ponce II. ("PROPIEDAD HPY -

C").

-----(D)-----RÚSTICA: Parcela de terreno que radica en el Barrio Canas del término municipal de Ponce, Puerto Rico, con un área superficial de cuarenta y cinco mil ochocientos cuarenta y nueve punto tres mil quinientos treinta y nueve metros cuadrados (45,849.3539) m/c, equivalentes a once punto seiscientos sesenta y seis (11.666) cuerdas. Colinda por el Norte, en una sola dirección y una distancia de mil ciento setenta punto novecientos diecisiete metros con la parcela marcada "A" en el plano de segregación levantado por el Ingeniero Rafael Dosal Lines; por el Sur, en una sola dirección y distancia de mil ciento cincuenta y cinco punto trescientos cincuenta metros con la parcela marcada "C" en el antes referido plano que fuera segregada de la finca de noventa cuerdas de cuyo resto se segrega esta parcela; por el Este, en una sola dirección con terrenos de la Urbanización Punto Oro en una distancia de treinta y nueve punto cuatrocientos ochenta y cuatro metros; y por el Oeste, en una sola dirección y una distancia de cuarenta y uno punto cero sesenta y cinco metros, con terrenos de la Hacienda Matilde, propiedad de la Sociedad Mario Mercado e Hijos de la cual se segregaron las noventa cuerdas de cuyo resto se segrega esta parcela.

-----Finca: antes número 44,915 de Ponce I, hoy la número 5870 de Ponce II, aparece descrita al folio 282 del tomo: antes 1488 de Ponce I, hoy el

625 de Ponce II. ("PROPIEDAD HPY - D").

-----(E)-----RÚSTICA: Parcela de terreno radicada en el Barrio Canas del término municipal de Ponce, Puerto Rico, con una cabida superficial de ONCE PUNTO SEISCIENTOS SESENTA Y SEIS (11.666) CUERDAS, equivalentes a CUARENTA Y CINCO MIL OCHOCIENTOS CUARENTA Y NUEVE PUNTO TRES MIL QUINIENTOS TREINTA Y NUEVE METROS. Colinda por el Norte, en una sola dirección y distancia de mil ciento ochenta y ocho punto seiscientos setenta metros, con la parcela marcada "A" del plano de segregación levantado por el Ingeniero Rafael Dosal Lines; por el Sur, en una sola dirección y distancia de mil ciento setenta punto novecientos diecisiete metros con la parcela marcada "D" en el plano de segregación referido y que fuera segregada de la finca de novena cuerdas de cuyo resto se segrega la parcela aquí descrita; por el Este, en una sola dirección con terrenos de la Urbanización Punto Oro en una distancia de treinta y ocho punto novecientos noventa y tres metros; y por el Oeste, en una sola dirección y distancia de cuarenta punto doscientos cuarenta y tres metros con terrenos de la Hacienda Matilde propiedad de la Sindicatura de la Sociedad de Mario Mercado e Hijos de la cual se segregaron las noventa cuerdas de cuyo resto se segrega esta parcela.

-----Finca: antes número 44,916 de Ponce I, hoy la número 9463 de Ponce II aparece descrita al folio 290 del

tomo: antes 1488 de Ponce I, hoy 625 de Ponce II. ("PROPIEDAD HPY - E").

8. On or about 1985, squatters, without valid title or authorization from the Plaintiff started massive land invasions on said properties. The squatters, also Defendants of this suit, encouraged and abetted by the other Defendants, proceeded to construct or build shacks and houses on Plaintiff's properties.

9. On or about June 1987, it was decided by the Superior Court in Ponce on Civil Case CS-86-2817 that any further construction or additions on the properties would constitute an act of bad faith on the part of the illegal squatters.

10. On or about May 1990, the Superior Court of Ponce handed down a Resolution based on evidence presented on CS-86-2817 and on the consolidated case No. CS-85-1459 where it concluded that the invasors had not acted in good faith when they illegally entered and took possession of Plaintiff's properties. (See Exhibit I).

11. Notwithstanding the Resolution handed down by the Superior Court of Ponce, all the Defendants have continued to unlawfully, illegally and abusively deprive Plaintiff of its property and property rights without due process of law and without due compensation thus violating rights guaranteed to Plaintiff by the Constitution of the United States of America, particularly the Fifth and Fourteenth Amendments.

12. The unlawful acts under taken by the. Defendants, as so determined by the Superior Court in Ponce by the judgment rendered on June 4, 1991, have caused are causing and will continue to cause irreparable damages and injuries to Plaintiff in that Defendants promoted invasion of Plaintiff's properties without any compensation and has not only impaired Plaintiff's Constitutional Rights to the Free Exercise of its property right, but also has completely transformed the nature of

Plaintiff's properties, thus diminishing its value.

13. Plaintiff is without adequate state remedies at law and in equity to redress the irreparable injuries described in the preceding paragraphs.

14. The actions of Defendants described herein of intentionally promoting and abetting in depriving Plaintiff of its property rights have been performed under color of Commonwealth Statutes and contrary to the resolution emitted by the Superior Court of Ponce. Such actions taken thereunder and herein complained of are illegal, unlawful, oppressive and abusive as they constitute a violation of the Constitution of the United States of America and the Federal Civil Rights Act.

15. Unless the mandatory injunction previously issued by the Superior Court of Ponce against

Defendants, ordering them to immediately and forthwith restore the properties to its original state and condition and return the same to Plaintiff is complied with the, Plaintiff will continue to be subject of abusive, illegal, unlawful and oppressive violations of their Constitutional Rights by Defendants.

16. Plaintiff, by reasons of the facts set forth in the preceding paragraphs have suffered damages in excess of 30 million ($30,000,000.00) dollars.

VII. PUNITIVE DAMAGES

17. Plaintiff requests that the Defendants individually be assessed punitive damages as permitted in Sec. 1983-85 actions; **Smith v. Wade** 461 U.S. 30 (1980), as in this case there has been a reckless and callous disregard for plaintiff's rights and to deter similar conduct in the future. **Gutiérrez-**

Rodríguez v. Cartagena 882 F2d 553 (1 st. Cir. 1989). An award of no less than **Forty Million Dollars ($40,000,000.00)** is not unreasonable in this case.

WHEREFORE, Plaintiff respectfully pray that this Honorable Court grant the following remedies:

1. That it find that Defendants individually or collectively violated Plaintiff's Civil Rights as established under the Civil Rights Act as well as the Constitution of the United States..

2. That it restrain and permanently enjoin Defendants from continuing their abusive, discriminatory, illegal acts described above.

3. That the Defendants be adjudged and decreed jointly and severally liable to Plaintiff for the amount of no less that Forty Millions

($40,000,000.00) Dollars for damages caused to Plaintiff plus $20,000,000.00 for punitive damages.

4. Such other and further relief as the Court may deem just and equitable, including costs, expenses, interest and attorney's fees.

In San Juan, Puerto Rico, this day of April, 1992.

MERCADO & SOTO

P.O. BOX 4839

OLD SAN JUAN, P.R. 00902

Tel. (809) 723-5434

JUAN B. SOTO BALBAS

USDC-PR-130305

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN DIVISION

H.P.Y., INC.,	*	CIVIL NO.: 87-6584
Plaintiff,	*	IN RE:
vs.	*	
COMMONWEALTH OF	*	
PUERTO RICO	*	
Defendants	*	

****

COMPLAINT

BEFORE THIS HONORABLE COURT:

COMES NOW H.P.Y., INC., represented by its attorneys who sign below and very respectfully state, allege and pray:

1. That the plaintiff is the owner of the following land located in Ponce, Puerto Rico.

RURAL: A parcel of land located in Canas

Ward in the municipal district of Ponce, Puerto Rico with a surface area of twenty-six point six thousand seven hundred twenty cuerdas, equivalent to one hundred four thousand eight hundred forty point three thousand eight hundred eighty-three (104,840.3883) square meters, bounded on the North by the main property, from which the ninety cuerdas were subdivided in two directions, one for nine hundred fifty-six point zero fifteen (956.015) meters, and the other for two hundred seventy-three point four hundred ninety-six (273.496) meters; on the South by Parcel E, for one thousand one hundred eighty-eight point six hundred seventy (1,188.670) meters, on the East for three point five hundred seventy-four (3.574) meters, by the Punto Oro Development, and on the West for one hundred two point zero eighty-five (102.085) meters by land belonging to the property of the Hacienda Matilde, from

which it was subdivided. This parcel is marked with the letter A on the subdivision map made by the engineer, Rafael Dosal.

RURAL: Piece of Land that is located in the Canas Ward in the municipal district of Ponce, Puerto Rico, with a surface area of Ninety (90) cuerdas, equivalent to thirty-five hectares, thirty-seven ares and thirty-six centares, which is bounded on the North by land from the main parcel from which it is subdivided, on the South, by the Punta Oro Development, that is, land that was subdivided from the main parcel; on the East by land from the main parcel from which it is subdivided and on the West by the Punto de Oro Development and partially by land from the Ferré Development.

RURAL: Piece of land located in Canas

Ward in the municipal district of Ponce, Puerto Rico, with a surface area of one hundred eleven thousand three hundred forty-seven square meters and fifty-five centimeters (111,347.55) equivalent to twenty-eight and three thousand three hundred thirty-three ten-thousandths cuerdas (28,3333) bounded on the North by the remaining sixty-one point six thousand six hundred sixty-seven (61.6667) cuerdas of the original Ninety Cuerdas, for a distance of one thousand one hundred thirty-seven meters (1,139.587) (sic) and in a direction of seventy-eight degrees, forty-six minutes and fifty-four seconds North by East. On the South, by land belonging to the Punto de Oro Development for a distance of one thousand ninety-five point six hundred and eighteen meters (1,095.618) in a direction of seventy-eight degrees, fifty-seven minutes and fifty-three seconds South by West. On the

East, by land belonging to the Punto Oro Development, for a distance of sixty-five point nine hundred thirty-eight (65.938) meters in a direction of four degrees, two minutes and three seconds South by East, and a distance of thirty-seven point zero seventy-two (37.072) meters, in a direction of three degrees, forty-one minutes and forty-seven seconds South by West. On the West. On the West, by land belonging to the Mario Mercado and Sons Partnership, from which the Ninety Cuerda parcel was subdivided from which the parcel described herein is subdivided, in a distance of one hundred one point one hundred eighty-five (101.185) meters in a direction of twenty-six degrees, thirteen minutes and seven seconds North by West.

PARCEL: of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with an area of eleven point six

thousand six hundred sixty-six (11,666) (sic) cuerdas equivalent to forty-five thousand eight hundred fifty-four point four thousand forty-six (45,854.4046) square meters, bounded on the North by a parcel identified by the letter "A" on the subdivision map made by the engineer, Rafael Dosal Lines, in other words, with more land from the ninety cuerda parcel from which this parcel is subdivided, said boundary being a single alignment of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters; on the South by one single alignment of one thousand one hundred thirty-nine point five hundred eighty-seven meters (1139.587); bounded by land subdivided from the Ninety Cuerda parcel identified as Parcel "B" in the above-mentioned map made by the engineer, Rafael Dosal Lines; on the East, in one single alignment of forty point fifteen (40.15) meters bounded

by the Punto Oro Development, and on the West by one single alignment of forty-one point five hundred four (41.504) meters, bounded by more land from the main parcel known as Hacienda Matilde, property belonging to the Mario Mercado and Sons Partnership.

PARCEL: of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of forty-five thousand eight hundred forty-nine point three thousand five hundred thirty-nine (45,849.3539) square meters, equivalent to eleven point six hundred sixty-six (11.666) cuerdas. Bounded on the North, in one single direction and for a distance of one thousand one hundred seventy point nine hundred seventeen (1,170,917) (sic) meters by the parcel marked "A" on the map made by the engineer, Rafael Dosal Lines and which is described below; on the South, in a single direction and for a

distance of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters by the parcel marked "C" on the above-mentioned map that was subdivided from the Ninety Cuerda parcel from which remainder this parcel is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for a distance of thirty-nine point four hundred eighty-four (39.484) meters; and on the West in a single direction and for a distance of forty-one point zero sixty-five (41.065) meters, by property from the Hacienda Matilde, belonging to the Mario Mercado and Sons Partnership from which the Ninety Cuerdas were subdivided from which remainder this parcel is subdivided.

2. That several unknown persons have encroached upon said land.

3. That the plaintiff has tried to file criminal charges against said encroachers in accordance with 33 LPRA 4283.

4. That the Honorable Secretary of Justice ordered the Police and the Prosecutors not to prosecute said complaints depriving the plaintiff of his legal remedy to evict said persons.

5. That the actions by the Government of the Commonwealth of Puerto Rico has turned said land into a public housing project without any compensation whatsoever for the plaintiff.

6. It has been requested that the Honorable Court declare said land public property and order the Government of the Commonwealth of Puerto Rico to pay an adequate compensation for said land.

WHEREFORE, it is very respectfully requested that the Honorable Court pronounce judgment declaring that said land has been converted to public property, belonging to the Commonwealth of Puerto Rico, and requiring the Government of the Commonwealth of Puerto Rico to pay its fair value to the plaintiff.

In San Juan, Puerto Rico, on November 20, 1987.

WOODS, ROSENBAUM, LUCKEROTH
& PEREZ GONZALEZ
Box 1292
Hato Rey, Puerto Rico 00919
Telephone: 759-8181

BY: Sgd. (illegible)
Ronald L. Rosenbaum

Translator's note: (1) A rubber stamp for the General Justice Court of the Commonwealth of Puerto Rico, Superior Court, Ponce Division, appears on each page; (2) Internal Revenue stamps; (3) Time stamped San Juan Judicial Center, November 20, 1987, 2:16 p.m.

Commonwealth of Puerto Rico

GENERAL JUSTICE COURT

SUPERIOR COURT

PONCE DIVISION

Courtroom F

H.P.Y., INC.,	*	CIVIL NO.: N CS87-2621
Plaintiff,	*	IN RE:
vs.	*	INVERSE CONDEMNATION
COMMONWEALTH	*	
OF PUERTO RICO	*	
Defendant	*	

****

- M I N U T E S -

After the case had been called for the pretrial conference, appearances were made by Atty. Ronald L. Rosenbaum, in representation of the plaintiff, and by Atty. Angel L. Flores Fernández, representing the defendant.

The plaintiff requests a term of ninety days to verify whether his party's property was included in a condemnation case.

The Court accedes to what has been requested and grants the plaintiff a term of sixty days to report as to whether or not it is going to continue with the proceedings in this case in view of the information that it has submitted concerning a case that has been filed in the Condemnation Court in which the property that is the subject of this complaint is possibly included.

The report is left to the attorneys for the parties and shall be subsequently submitted if necessary after investigating the pending matter.

It is ordered that the attorneys for the parties shall be notified through a copy of the minutes.

n/c Atty. Ronald L. Rosenbaum

Atty. Angel L. Flores Fernández

12/7/88

Minutes Book No. NAME OF BAILIFF: **JOSE VEGA**

Name of Judge: **HON. LEIDA GONZALEZ DEGRO**

I CERTIFY: **PAULITA COLON RIVERA**

(Clerk)

Name of Reporter: BY: **MARIA M. GUZMAN**

(IN CHAMBERS) (Chief Deputy Clerk)

(Sgd.)

DATE: **DECEMBER 7, 1988**

CIVIL MINUTES

(SUPERIOR AND DISTRICT COURT)

OAT 838 (REV. JULY 1975)

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO

PONCE DIVISION

H.P.Y., INC.,	*	CIVIL NO.: CS-87-2621 (F)
Plaintiff,	*	IN RE:
vs.	*	INVERSE CONDEMNATION
COMMONWEALTH OF	*	
PUERTO RICO	*	
Defendant	*	

****

MOTION FOR DISMISSAL WITHOUT PREJUDICE

BEFORE THIS HONORABLE COURT:

COMES NOW the plaintiff through its attorneys who sign below and very respectfully state and pray:

1. That our surveyors have verified that the encumbered area affected that is the subject of

the present litigation is within the condemned property for which we request the dismissal of the present case without prejudice.

WHEREFORE, it is very respectfully requested that this Honorable Court dismiss the present action without prejudice.

San Juan, Puerto Rico, June 6, 1989.

I CERTIFY: Having sent a true and exact copy of the present Motion to Atty. Angel L. Flores Fernández, Department of Justice, Miramar, Puerto Rico.

WOODS, ROSENBAUM, LUCKEROTH
& PEREZ GONZALEZ
PO BOX 1292
HATO REY, PUERTO RICO 0091
TEL: 759-8181

(Sgd./illegible)

Ronald L. Rosenbaum

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO

PONCE DIVISION

H.P.Y., INC.,	*	CIVIL NO.: CS-87-2621
Plaintiff,	*	IN RE:
vs.	*	INVERSE CONDEMNATION
	*	
COMMONWEALTH	*	
OF PUERTO RICO	*	
Defendant	*	

****

J U D G M E N T

Having considered the motion for dismissal filed by the plaintiff and having analyzed the present case file the court **GRANTS** the dismissal and, in consequence, issues a judgment ordering the dismissal of this case with prejudice.

ENTER AND NOTIFY.

Issued in Ponce, P.R., on April 20, 1990.

(SGD.) LEIDA GONZALEZ DEGRO

SUPERIOR COURT JUDGE

CERTIFICATION

I certify that the present is a true and exact copy of the original which is in the case file and I issue it at the request of: Atty. Francisco J. Amundaray

/X/ Upon payment of fees /_/ Free of charge

Clerk (Sgd./illegible)

4/21/93

Deputy Clerk

(Sgd./illegible)

Translator's note: (1) A rubber stamp appears for the General Justice Court of the Commonwealth of Puerto Rico, Superior Court, Ponce Division; (2) Internal Revenue Stamps.

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN DIVISION

	*	
COMMONWEALTH OF	*	
PUERTO RICO	*	CIVIL NO. 88-0418 (1007)
Plaintiff	*	RE: EXPROPRIATION BY
vs.	*	RIGHT OF EMINENT
	*	DOMAIN
EUFEMIA EILEEN	*	
MERCADO PARRA,	*	
ETC.	*	
Defendants	*	
HPY CORPORATION	*	
Intervener	*	

****

THIRD MOTION ON INTERVENTION

BEFORE THE HONORABLE COURT:

Comes, now, the intervening party, HPY

Corporation ("HPY") through its attorneys who sign below and very respectfully states, alleges and prays:

1. That in the Ponce case, Civil Number CS85-1459, the question of title to the expropriated property between Estate of Mario Mercado and the Intervener was not raised.

2. Attached as Exhibit A is the report of the architect, Carlos Buxó, regarding the title of HPY to 75 "cuerdas" (acres) which belong to HPY, Inc.

3. It has been verified that the error of the Government in the above-captioned case is that the Government's surveyor used a mistaken legal description and in the preparation of his measurement never consulted with the Intervener.

WHEREFORE, it is very respectfully requested that the Honorable Court allow the

requested intervention.

In San Juan, Puerto Rico, on March 30, 1990.

I CERTIFY: Having sent a true and exact copy of the previous motion, on this same date, to the Honorable Secretary of Justice, Land Cases Division, Box 192, San Juan, Puerto Rico 00902, and to Atty. A.J. Bennazar Zequeira, Banco Popular de Puerto Rico Building, Office 1501, Hato Rey, Puerto Rico 00918.

WOODS, ROSENBAUM, LUCKEROTH
& PEREZ GONZALEZ
Box 1292
Hato Rey, Puerto Rico 00919
Telephone: (809) 759-8181
BY: (Sgd.) Ronald L. Rosenbaum

CERTIFIED TRANSLATION

Commonwealth of Puerto Rico

GENERAL JUSTICE COURT

SUPERIOR COURT

SAN JUAN DIVISION

Room 1007

COMMONWEALTH OF PUERTO RICO Plaintiff	Civil No. KEF-88-0418(1007)
vs.	IN RE:
EUFEMIA EILEEN C/P EILEEN AND FOR ADRIANA LUISA MERCADO Defendant	CONDEMNATION UNDER SOVEREIGN RIGHT OF EMINENT DOMAIN

-MINUTES-

The case was called for the Follow-up Hearing set for today, at which the petitioner appeared represented by attorney William Nunez Colon. The Estate of Mario Mercado was represented by Attorney Juan Jesus Ramirez Rivera, and the intervening party appeared represented by Attorney Ronald L. Rosenbaum. As to Attorney Ramon Eugenio Melendez, the Court ordered that he be removed from the record since he is not in the case.

The hearing that was set for today is to clarify the ownership of the property that adjoins the condemned lot, specifically at points Dos Oro and Tres Oro. A request to intervene arises from HPY Corporation represented by Attorney Rosenbaum, in the sense that its concern was essentially based on the description that exhibit "A" gives of the condemned lot, since it was indicated that on the East side it had

boundaries with the Punto Oro Development.

In the conference room the parties had the opportunity to look at some blueprints and some explanations making it clear that the condemned lot borders the HPY Corporation Development on the East and not the Punto Oro Development.

Once this situation had been resolved, the Court decided that the intervention was not in order, since the State has no interest in acquiring properties from that Corporation, since it has its property outside the limits of the condemned area. As there were no problems, therefore, its intervention is not justified because there is no interest.

There was also another difficulty as to locating a piece of property which has an area of approximately 17, 19 cuerdas, which at this moment is being encroached upon by a series of individuals. The legal representation for the

Mercado Estate asks the State and requests if this property is to be acquired.

The legal representation for the expropriating agency stated that at the moment they do not have plans to acquire it, therefore, that property together with those structures and with the matters that pertain to it will continue to belong to the Mercado Estate.

It is for that reason that at this time it should be clarified that a petition to transfer some of the cases from the Ponce Court regarding the Eviction of some families that are on that property will not be included in the expropriation calendar, since, what is in order is that they continue in the Ponce Court.

That being the situation, it is therefore in order for the boundary indicated in exhibit "A" to be corrected in order to clarify all of these doubts. What is to be followed in this case is

the discussion of the assets, for which reason an assertion is going to be made to speak about the assets.

It has been anticipated that there are some matters which should be resolved by the Court before initiating the discussion of this aspect. The attorney for the interested party will provide the petitioner with information regarding some damages due to the dissolving of the partnership and other damages so that the State appraisers can be in a position to analyze this situation in order to discuss it.

It was also anticipated that we would have to discuss the matter as to whether or not the property would be considered an empty lot on the one hand, and other positions that the property had some structures whose removal would have to be deducted from the value.

In order for both parties to be able to be

prepared, the argument of this case will be continued to March 21, 1991, at nine o'clock in the morning, in hearing room (1007).

The Court made it clear that the attorney who represents the Mercado Estate requested the Court to order the payment of the consigned funds. To that effect, the Court requested that evidence of the payment of land taxes be submitted, together with any other tax lien there may be on the property in order to consider said request.

Once the aforementioned is submitted, the Court will order the payment accordingly. Even though the parties were notified of the aforementioned in open court, they will be sent a copy of these minutes.

Notified with a copy of the minutes and mailed to the attorneys of the parties today, November 28, 1990.

Attorney William Nunez Colon

Department of Justice

Division of Land Cases

Box 192

San Juan, Puerto Rico 00902

Attorney Ronald L. Rosenbaum

Box 1292

Hato Rey, Puerto Rico (illegible)

Attorney Juan Jesus (illegible)

Box 720

Mayaguez, Puerto Rico 00709

MUNUTES NO._____ Marshal: MR. RUBEN ZAYAS

JUDGE: HON. ANGEL GONZALEZ ROMAN

I certify: PAULITA SANTIAGO

Clerk

COURT REPORTER: CARMEN IRIS RIVAS

HEARING WAS RECORDED

By: (Sgd.) ANGELINA ORTIZ SANTOS

Chief Deputy Clerk

Date: October 30, 1990

Civil Minutes (Superior and District Court)

O.A.T. 838 (rev. July 1975)

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO
PONCE DIVISION

Hearing Room B

COMMONWEALTH OF PUERTO RICO, etc. Plaintiffs vs. MARIO L. MERCADO ESTATE, etc. Defendants	*	CIVIL NO. CS85-2439 (5) IN RE: TEMPORARY INJUNCTION
ALFONSO A. HERNANDEZ ORTIZ, etc. Plaintiffs vs. MODESTO HERNANDEZ VARGAS, etc. Defendants	*	CIVIL NO. CS86-2817 (B) IN RE: PRECARIOUS EVICTION AND ACCESSION

MINUTES

At the status conference set for today Atty. Jaime Rivera Torres appeared in representation of the plaintiff, Alfonso Hernández Ortiz and in substitution of Atty. René F. Sotomayor Santos, Atty. Ronald L. Rosenbaum appeared in representation of the codefendant HPY, Atty.

Juan Jesús Ramírez appeared in representation of the Mario Mercado Estate, and Atty. Gilberto Limardo appeared, who reports that he is going to have an interview with the previous clients of Atty. Martin González (rescuers) and shall determine whom he is going to represent. Att. Carlos J. Pérez Santiago did not appear. For notifications and future calendars, it has been clarified that these are the only attorneys in the case.

The codefendant HPY requests the reopening of the original eviction case.

The Court clarifies that in a prior decision where it provided that starting from a certain date the defendants to the eviction or possessionary injunction shall be bad faith constructors, it adjudicated nothing with respect to whether these people had good faith or not before that date.

The case at bar actually involves two or three cases within the same suit. The title and boundaries must be cleared up between the Mario Mercado Estate and Alfonso Hernández. To that end, a pretrial conference is set to be held on February 11, 1991. The meeting between the attorneys shall be held on February 2, 1991, at 10:00 a.m., at the office of Atty. Ramírez in Mayagüez. That same day, February 11, a pretrial conference shall be held as to the aspect of the eviction both by HPY and of the other two plaintiffs against the squatters. Notify Att. Carlos J. Pérez Santiago of this case setting, indicating to him that he has to be prepared. Any attorney that has not participated in the conference, under his own professional responsibility, shall not be allowed to announce any evidence, in fact, the party that he represents is going to be in default, and the attorney is exposed to a complaint against him on behalf of his clients.

Based on the information supplied by the parties to the effect that in the San Juan Division it was decided that part of the property belonging to HPY where there are squatters was not expropriated, the Court grants the petition of the codefendant HPY for the reopening of the case and sets aside the voluntary dismissal of action made by this party during the visual inspection.

It is ordered that the attorneys be notified by a copy of the minutes of October 30, 1990 in the case of KEF 88-0418 (1007), which shall be attached to the record when Atty. Ramírez brings a copy. (he subsequently delivered it.) The attorneys were notified. The following were notified by way of a copy of the minutes (and with a copy of the minutes from the San Juan Division):

Atty. Juan Jesús Ramírez, Box 720, Mayagüez, PR 00709; Atty. Jaime M. Rivera, Box 208, San

Germán, PR 00753; Atty. Gilberto Limardo, Box 226, Playa Sta., Ponce, PR 00734; Atty. René F. Sotomayor Santos, Box 1747, Ponce, PR 00733; Atty. Carlos J. Pérez Santiago, Box 6930, Ponce, PR 00733;

12-10-90

Minutes Book No. 8

Bailiff: B. RAMOS

JUDGE: HON. LUIS MUÑIZ ARGUELLES

I certify: P. COLON

Reporter: WANDA I. BLANCO

By: A.J. Velázquez

Date: November 30, 1990

Trans. 12-10-90

CERTIFIED TRANSLATION

IN THE GENERAL JUSTICE COURT OF PUERTO RICO
SUPERIOR COURT - PONCE DIVISION
JUDICIAL CENTER

COMMONWEALTH OF PUERTO RICO ET AL. Plaintiffs	*	CIVIL NO. CS85-1459
v. ESTATE OF MARIO L. MERCADO, ET AL., Defendants	*	IN RE: TEMPORARY INJUNCTION
ALFONSO A. HERNANDEZ ORTIZ, ET AL. Plaintiffs	*	CIVIL NO. CS86-2817
v. MODESTO HERNANDEZ VARGAS, ET AL. Defendants	*	RE: EVICTION ACTION FOR UNLAWFUL DETAINER AND ACCESSION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

As the present cases have been called to hold the trial on the merits regarding them, come now: (A) (I) THE ESTATE OF MARIO MERCADO RIERA — made up of: (a) Eufemia Eileen known as Eileen Mercado Parra, (b) Adriana Luisa Mercado Parra, (c) Eileen María Coffey Mercado, (d) David Mario Coffey Mercado, (e) María Luisa

Wilson Mercado, (f) Margarita María Wilson Mercado, and (g) Richard Wilson Mercado — (Civil Number CS85-1459 and CS86-2817) ("ESTATE OF MARIO MERCADO RIERA"), (II) HPY, INC. (Civil Number CS85-1429), (III) ALFONSO ANTONIO HERNANDEZ ORTIZ (Civil Number CS86-2817), hereinafter referred to as the "plaintiffs," represented by their attorneys; (B) the defendants in the above-captioned cases under the jurisdiction of this Court, some in default and others duly represented by their attorneys.

The plaintiffs in the cases of title interposed their pertinent evidence before the court; as did some of the defendants; this being the only evidence that was presented in the proceedings.

Having heard all of the evidence admitted from what has been offered, this Court makes the following:

FINDINGS OF FACT

1. The plaintiffs and their predecessors in title have had ownership and also title in fee simple recorded in the Property Registry for the following property. Said title and ownership has been the during the year immediately prior to the filing of the complaint and in prior years, to wit:

(a) THE ESTATE OF MARIO MERCADO RIERA, composed of: (a) Eufemia Eileen known as Eileen Mercado Parra, (b) Adriana Luisa Mercado Parra, (c) Eileen María Coffey Mercado, (d) David Mario Coffey Mercado, (e) María Luisa Wilson Mercado, (f) Margarita María Wilson Mercado, and (g) Richard Wilson Mercado (Civil Number CS85-1459 and CS86-2817). Said title and ownership have been during the year immediately prior to the filing of the complaint and the remaining prior years. The property of mention is described in the registry as follows:

---Parcel MT-FOUR, RURAL: Located in Canas Ward in the municipal district of Ponce, Puerto Rico with an area of SEVEN HUNDRED FIFTY-FIVE CUERDAS FIFTY-EIGHT ONE-HUNDREDTHS, equivalent to two hundred fifty-seven hectares, sixty-six ares, ninety-one centares and six hundred thirty-two millares, made up of the following portions:

---Portion A: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of two hundred forty-six cuerdas seventy-three one-hundredths, equivalent to ninety-six hectares, ninety-seven ares, forty-seven centares and five hundred ninety-two millares, bounded on the North by state highway number two, in ten alignments that total fifty-eight point ninety-nine meters; on the East by land belonging to the Puerto Rico Aqueduct and Sewer Authority; Regional Office in

four alignments that total one hundred seventy-two point seventy-one meters with the portion MT-Three-Plains for an alignment of seven hundred twenty point forty-one meters; on the South by the Caribbean Sea for thirty-five alignments that total two thousand forty-seven point seventy-three meters and on the West by the Laguna de las Salinas for seven alignments that total one thousand one hundred ninety-eight point sixty-seven meters. This portion is identified in the subdivision map as parcels MT-Four-Plains-A for one hundred eighty-five cuerdas ninety-eight one-hundredths and MT-Four-Plains-B, sixty cuerdas seventy-five one-hundredths.

---Portion B: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of thirty-seven cuerdas seventy-three one-hundredths, equivalent

to fourteen hectares, eighty-two ares, ninety-three centares and nine hundred ninety-two millares, bounded on the North by the portion MT-Three-Industrial of Parcel MT-Three for an alignment of two hundred seventy-one point twenty-four meters; on the East by property belonging to the Puerto Rico Social Programs for eighteen alignments that total five hundred seven point ninety-seven meters; on the South by State Highway number two, in two alignments that total two hundred sixty-six point seventy-six meters and on the West by the portion MT-Three-Escarpment of parcel MT-Three for an alignment of four hundred eighty point twelve meters. This portion is identified in the subdivision map as parcel MT-Four-Industrial.

---Portion C: Rural: Located in Canas Ward in the municipal district of Ponce,

with an area of three hundred seventy-one cuerdas twelve one-hundredths, equivalent to one hundred forty-five hectares, eighty-six ares, fifty centares and zero forty-eight millares, on the North by land belonging to Empresas Ferré for ten alignments that total nine hundred fifty-eight point ten meters, by land belonging to Nicolás Pagán for five alignments that total two hundred ninety-seven point twenty-seven meters by land belonging to Empresas Ferré for twenty-seven alignments that total seven hundred point fifty-nine meters and by land belonging to Dr. Humberto Zayas Chardón for five alignments that total two hundred eighty-three point forty-one meters; on the East, by land belonging to Punto Oro Development or for four alignments that total one thousand four hundred forty-seven point nine meters; on the South, by land belonging to Ponce West Industrial Area and land

belonging to Social Programs for thirteen alignments that total four hundred eighty-nine point ten meters and by land belonging to the Puerto Rico Land Management for fourteen alignments that total two thousand twenty-three point thirty-four meters; and on the West, by the Portion MT-Three-Escarpment of Parcel MT-Three, for an alignment of one thousand two hundred five point seventy-five meters. This portion is identified in the subdivision map as MT-Four-Escarpment.

---This has been previously recorded under property number 46,412 for Ponce I, presently number 1981 for Ponce II, and is described on page 115 of volume 1529 for Ponce I, first entry; and on page 115 of volume 669 for Ponce II.

From the property described above the following portion is the subject of this consolidated litigation:

---Portion C: Rural: Located in Canas Ward in the municipal district of Ponce, with an area of three hundred seventy-one cuerdas twelve one-hundredths, equivalent to one hundred forty-five hectares, eighty-six ares, fifty centares and zero forty-eight millares, bounded on the North by land belonging to Ferré Enterprises for ten alignments that total nine hundred fifty-eight point ten meters, by land belonging to Nicolás Pagán for five alignments that total two hundred ninety-seven point twenty-seven meters by land belonging to Ferré Enterprises for twenty-seven alignments that total seven hundred point fifty-nine meters and by land belonging to Dr. Humberto Zayas Chardón for five alignments that total two hundred eighty-three point forty-one meters; on the East by land belonging to Punto Oro Development or for four alignments that total one thousand four hundred forty-

seven point nine meters; on the South by land belonging to Ponce West Industrial Area and land belonging to Social Programs for thirteen alignments that total four hundred eighty-nine point ten meters and by land belonging to the Puerto Rico Land Management for fourteen alignments that total two thousand twenty-three point thirty-four meters; on the West by Portion MT-Three-Escarpment of Parcel MT-Three, for an alignment of one thousand two hundred five point seventy-five meters. This portion is identified in the subdivision map as MT-Four-Escarpment.

The ESTATE OF MARIO MERCADO RIVERA has had ownership of and title to said property with exclusivity over the prior partners of the Mario Mercado and Sons Partnership in accordance with the RULING issued by the Honorable Superior Court Judge, Víctor Vargas Negrón, since December 23, 1976, in virtue of the adjudication

made by this same Court in the Case CS57-2295, on the Dissolution of Partnership; this property having been consolidated with others under judicial trusteeship in said case.

(b) HPY, INC. (Civil Number CS89-1459) a corporation organized under the laws of the State of Delaware, United States of America and authorized to do business in Puerto Rico and registered with the Department of State for the Commonwealth of Puerto Rico. The properties mentioned are described in the registry as follows:

(A)---RURAL: A parcel located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of TWENTY-SIX POINT SIX THOUSAND SEVEN HUNDRED TWENTY CUERDAS, equivalent to ONE HUNDRED FOUR THOUSAND EIGHT HUNDRED FORTY POINT THREE THOUSAND EIGHT HUNDRED EIGHTY-THREE SQUARE METERS (104,840.3883). On the

North by part of the main property in two directions from which the ninety cuerdas were subdivided of which the present is a remainder, land belonging to the Trusteeship of the Mario Mercado and Sons Partnership, in the first direction for a distance of nine hundred fifty-six point fifteen meters, and in the second direction for a distance of two hundred seventy-three point four hundred ninety-six meters; on the South by and in one single direction and for a distance of one thousand one hundred eighty-eight point six hundred seventy meters by the parcel described with the letter "E" in the map made by the engineer, Rafael Dosal Lines; on the East, in one single direction and distance of three point five hundred seventy-four meters, by the Punto Oro Development; and on the West, in one single direction and for a distance of one hundred two point eighty-five meters by

land from the main property know as Hacienda Matilde, belonging to the Trusteeship of Mario Mercado and Sons Partnership and from which the parcel of fifty cuerdas was subdivided, of which this is a remainder. This parcel is marked "A" in the subdivision map made by the engineer, Rafael Dosal Lines.

---The parcel described here is the remainder of the one with this number after deducting from its area of ninety cuerdas the parcels subdivided and that are indicated in the margin notes for the previous first recording.

---Property: previously numbered 35,564 for Ponce I, presently number 5868 for Ponce II, is described on the back of page 165 of volume: previously 1263 for Ponce I, presently 521 for Ponce II.

(B)---RURAL: Parcel of land located in Canas Ward in the municipal district of

Ponce, Puerto Rico with an area of ELEVEN POINT SIX THOUSAND SIX HUNDRED SIXTY-SIX CUERDAS equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FIFTY-FOUR POINT FOUR THOUSAND FORTY-SIX SQUARE METERS (45,854.4046), bounded on the North by a parcel identified by the letter (A) in the subdivision map made by the engineer, Rafael Dosal Lines, in other words, by more land from the ninety cuerda parcel from which this parcel was subdivided, said boundary being a single alignment of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters; on the South in one single alignment of one thousand one hundred thirty-nine point three hundred eighty-seven meters, bounded by land subdivided from the ninety cuerda parcel identified as Parcel "B" in the above-mentioned map made by the engineer, Rafael Dosal Lines; on the East, in one single alignment of forty point fifteen

meters bounded by the Punto Oro Development; and on the West in one single alignment of forty-one point five hundred four meters, bounded by more land from the main property known as Hacienda Matilde, property belonging to the Mario Mercado and Sons Partnership.

---Property: previously numbered 43,077 for Ponce I, presently number 5869 for Ponce II is described on page 111 of the volume: previously numbered 1440 for Ponce I, presently number 598 for Ponce II.

(C)---RURAL: Piece of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of ONE HUNDRED ELEVEN THOUSAND THREE HUNDRED FORTY-SEVEN SQUARE METERS AND FIFTY-FIVE CENTIMETERS (111,347.55) equivalent to TWENTY-EIGHT AND THREE THOUSAND THREE HUNDRED THIRTY-THREE ONE-THOUSANDTHS

CUERDAS (28,3333) bounded on the North by the remaining sixty-one point six thousand six hundred sixty-seven cuerdas from the original ninety cuerdas, for a distance of one thousand one hundred thirty-nine point five hundred eighty-seven meters (1,139.587) and in a direction of seventy-eight degrees, forty-six minutes and fifty-four seconds North by East. On the South, by land belonging to the Punto Oro Development for a distance of one thousand ninety-five point six hundred and eighteen meters (1,095.618) or in a direction of seventy-eight degrees, fifty-seven minutes and fifty-three seconds South by West. On the East, by land belonging to the Punto Oro Development, for a distance of sixty-five point nine hundred thirty-eight meters (65.938) in a direction of four degrees, two minutes and three seconds South by East, and a distance of thirty-seven point zero seventy-two meters

(37.072), in a direction of three degrees, forty-one minutes and forty-seven seconds South by West. On the West by land belonging to the main property known as Hacienda Matilde, property of the Mario Mercado and Sons Partnership, from which the ninety cuerda parcel was subdivided from which the parcel described herein was subdivided for a distance of one hundred one point one hundred eighty-five meters (101.185) in a direction of twenty-six degrees, three minutes and seven seconds North by West.

---Property: previously numbered 39,436 for Ponce I, presently number 5867 for Ponce II is described on page 115 of the volume: previously numbered 1374 for Ponce I, presently number 578 for Ponce II.

(D)---RURAL: Parcel located in Canas Ward in the municipal district of Ponce, Puerto

Rico, with a surface area of forty-five thousand eight hundred forty-nine point three thousand five hundred thirty-nine square meters (45,849.3539) sq./m., equivalent to eleven point six hundred sixty-six (11.666) cuerdas. Bounded on the North, in one single direction and for a distance of one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "A" on the map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of one thousand fifty-five point three hundred fifty meters by the parcel marked "C" on the above-mentioned map that was subdivided from the ninety cuerda property from which remainder this parcel is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for a distance of thirty-nine four hundred eighty-four meters; and on the West, in a single

direction and for a distance of forty-one point zero sixty-five meters by property from the Hacienda Matilde, belonging to the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from which remainder this parcel is subdivided.

---Property: previously numbered 44,915 for Ponce I, presently number 5870 for Ponce II is described on page 282 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II.

(E)---RURAL: Parcel located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of ELEVEN POINT SIX HUNDRED SIXTY-SIX (11.666) CUERDAS, equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FORTY-NINE POINT THREE THOUSAND FIVE HUNDRED THIRTY-NINE METERS. Bounded on the North, in one single direction and

for a distance of one thousand one hundred eighty-eight point six hundred seventy meters by the parcel marked "A" on the map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "D" on the above-mentioned subdivision map, and that was subdivided from the ninety cuerda property from which remainder the parcel described herein is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for a distance of thirty-eight point nine hundred ninety-three meters; and on the West in a single direction and distance of forty point two hundred forty-three meters by property from the Hacienda Matilde, belonging to the Trusteeship of the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from

which remainder this parcel is subdivided. ---Property: previously numbered 44,916 for Ponce I, presently number 9463 for Ponce II is described on page 290 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II.

HPY, INC. has had ownership and title to said property in accordance with the law and title law as it appears in the Property Registry for Ponce II.

(c) ALFONSO ANTONIO HERNANDEZ ORTIZ (Civil Number CS86-2817). The property mentioned is described in the Property Registry as follows:

---"RURAL: A parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico, with an original surface area of One Hundred Fifty-Three Thousand Nine Hundred Twenty-Three Point Six Thousand Two Hundred Thirty-Six

(153,923.6236) Square Meters, equivalent to Thirty-Nine Point One Thousand Six Hundred Twenty-One (39.1621) Cuerdas, that after Thirty-Five Thousand Three Hundred Seventy-Six Point One Thousand Seven Hundred (25,376.1700) [sic] Square Meters were subdivided, equivalent to Nine Point Zero Zero Zero Seven (9.007) [sic] cuerdas that formed property number twenty seven thousand one hundred eighty-eight (27,188), there remains One Hundred Eighteen Thousand Five Hundred Forty-Six Point Four Thousand Five Hundred Thirty-Six (118,546.4536) equivalent to Thirty Point One Thousand Six Hundred Fourteen (30.1614) cuerdas, bounded on the North by Street Number One (1) to be built from the Punto Oro Development and for a distance of One Hundred Fifty-Four Thousand Two Hundred Forty-Eight (154,248) lineal Meters; on the South, and in different alignments for a distance of Five Hundred

Fifty Point Six Hundred Thirty-Seven (550.637) lineal meters by state highway number two (2) ("Ponce Bypass"); on the East for a distance of Eight Hundred Sixty-Nine Point Two Hundred Fifty-Seven (869.257) lineal meters by street Number One (1) of the Punto Oro Development and on the West in several Alignments and for a distance of Six Hundred Forty-Four Point Three Hundred Forty-One (644.341) by the Industrial Development El Tuque."

---Recorded on June 18, 1986 on the back of page 14 of volume 1,296 presently 540 for Ponce II, property number 31,640, presently 7,823, eighth entry, encumbered from its origin by a right-of-way in favor of the Commonwealth.

ALFONSO ANTONIO HERNANDEZ ORTIZ has had ownership and title to said property in accordance with the law and title law according

to what appears in the Property Registry for Ponce II.

2. In accordance with the evidence presented and believed by this Court, the defendants in the instant case, without the express or implicit authorization of the plaintiffs, and without valid title or right of any nature, entered and encroached upon the above-mentioned pieces of land and presently have built a series of shacks, huts and houses, having temporarily marked off what seems to be lots during the year 1985 and thereafter.

3. Previously this Court, and particularly in Civil Case CS86-2817, since June 4, 1987, had determined that any further additions or construction was, from then on, bad faith construction, which was subsequently ratified by this Court in its RULING of May 22, 1990 by the Honorable Superior Court Judge, Luis Muñiz Arguelles, in which this Court also established

that "(1) good faith or bad faith is a subjective concept and it may be proven that on subsequent dates the owners do not have good faith."; this Court in accordance with the evidence presented and believed determines that the defendants never had good faith in the illicit ownership of the property that was encroached upon.

4. The plaintiffs acted promptly to protect their interests in the property by going to the State Police and the Courts of this jurisdiction.

5. Having examined the consolidated case file, heard and examined the evidence and the admissions against interest made by the defendants affiants; this Court concludes as a proven fact that there has been manifest temerity in the actions of the defendants during the entire process, both extrajudicial and judicial.

CONCLUSIONS OF LAW

The plaintiffs in the case cited have been the owners for more than one year of the property described above. Before the filing of the present complaint the plaintiffs were disturbed from the possession or ownership of the property described above, because the defendants through an "act of encroachment" and without the authorization of the plaintiffs illegally entered the above-mentioned property with the intention of possessing it.

An Injunction shall be granted to retain and recover material ownership of the property, at the behest of the interested party, provided that it shows to the satisfaction of the Court, that it has been disturbed from the possession or ownership of said property, by acts that show the intent of harassing or taking it away, or when said possession or ownership has already been taken away. Civil Procedure Code, 1933,

Art. 690, 32 LPRA 3561.

In writs of possession, which is one of the actions that are exercised in the present case, only the question of possession is discussed, and not the right to said possession, nor the title of ownership to the property involved in the writ. Rivera v. Carcel, 68 DPR 365; Mena v. Llerandi, 70 DPR 176; Maldonado v. Colón, 68 SPR 340; Manrique v. Alvarez, 58 DPR 74; Gómez v. López 55 DPR 813; De Los Santos v. Seijo, 53 DPR 442; Pueblo v. Fajardo Sugar Growers Ass., 45 DPR 380; Figueroa v. Lugo y El Pueblo, 43 DPR 865; Fajardo Sugar v. Central Pasto Viejo, Inc., 41 DPR 825; Fernández v. González 41 DPR 726.

The main point in the Writ of Possession is always just a question of material and physical possession as far as occupancy is concerned, never a question of possession or right in civil possession, whether implied or legal. Pérez v. Castro, 52 DPR 573 and has the purpose of the

protection of the fact of possession, without harming the rights of the interested parties. Rodríguez v. Suárez, 71 DPR 728 and therein questions of title cannot be resolved; Sucn. Maldonado v. Maldonado, 43 DPR 678.

In writs of possession, the question to be resolved is whether the plaintiff was in possession on a given date within the year prior to the filing of the complaint and whether he was deprived of such possession. Martorell v. Municipio, 70 DPR 380; Rodríguez v. Suárez, 71 DPR 728; 32 LPRA 3562.

The writ of possession has the purpose of maintaining the ownership of the person who has it and is disrupted from it, without being able to resolve questions of title. Segarra v. Vilariño, 92 DPR 314.

From the related facts it is clear that the plaintiff, within the year prior to the filing

of the complaint had actual possession of the property that is described therein, as well as the fact that he was hindered and/or dispossessed of said possession or ownership.

In Texaco, Inc. v. González , 96 DPR 305, our Supreme Court stated:

"The writ action is available to any owner." Castán says, in the work cited, on page 456:

> "In our Code the system is different. Since Article 446, as we have just seen (our Art. 375) grants protection for all owners and Art. 1.651 of Procedural Law (Art. 690 of our Civil Procedure Code) speaks of possession or ownership, it must be understood that writs are applicable both for one and for the other, and that they can be used by the possessor as a title of ownership, the simple occupant or actual owner, the

usufructuary, the collateral holder, the obligee in a contract of antichresis, anyone using the right of retention, the lessee, the commodatary, the trustee and in a word, anyone who uses the technique of the Civil Code has possession, whether natural or civil, in the sense of owner or in a different sense."

The plaintiff, Alfonso Antonio Hernández Ortiz, has had possession since May 23, 1986, and his title has been recorded in the Property Registry since June 18 of that same year, having been presented on June 13, 1986. The complaint in the case is dated November 26, 1986. Before the filing of the case of record, the plaintiff was hindered from possession or ownership of his above-mentioned property, because the defendants, through an act of encroachment and without the authorization of the plaintiff-

owner, illegally entered on the premises of the land mentioned with the intention of partially possessing it.

The defendants admitted not having any title to oppose the plaintiffs, nor express or tacit authorization from third parties to encroach upon it. They alleged a moral right and in a case in particular law at the hands of God.

The eviction action for unlawful detainer filed by the plaintiff is predicated on the fact that there has been no payment rate or compensation of any kind on behalf of the defendants to the plaintiff, due to the total absence of title on behalf of the defendants and due to the total absence of tacit or express permission on behalf of the plaintiff-owner or from any third party that may have been able to confuse this piece of land with another. This is nothing more or less than a case of total "encroachment", that warrants the ejection of the encroaching

defendants from the land that is the subject of the complaint.

The plaintiff, ALFONSO ANTONIO HERNANDEZ ORTIZ, properly justified his title to the defendants, along with the boundaries of his property, both with a copy of his duly recorded deed and photographs (documentary evidence) and with the testimony (oral evidence) of its administrator and real estate broker; and the other plaintiffs: ESTATE OF MARIO MERCADO RIERA properly justified its title to the defendants, along with the boundaries of his property, both through a Registry Certification that is in the record, duly certified maps and photographs (documentary evidence) and with the testimony (oral evidence) of its administrator and coowner, and HPY, INC. properly justified its title to the defendants, along with the boundaries of his property, both through a Registry Certification that is in the record, duly certified maps and photographs (documentary

evidence) and with the testimony (oral evidence) of its architect and surveyor.

In cases like the present one, of illegal encroachment knowingly perpetrated on another's property, said encroachment does not create a right of privacy whatsoever for the encroachers nor does it protect its illegal possession. People who illegally and without any right whatsoever encroach on another's property, said encroachment does not create a right of privacy whatsoever for the encroachers nor does it protect their illegal encroachment. See Amezquita v. Rafael Hernández Colón, 518 F 2d. 8.

Anyone who builds in bad faith on any other person's land loses what has been built without any right to indemnity. When the defendant has precarious possession, as in the case of record the eviction is in order. See A.T.P.R. v. Padín Santiago, 104 DPR 426.

The eviction trial is one of a summary nature in which the only question is to try to recover possession of a piece of property for the person who has right to it Negrón v Corujo, 67 DPR 398; Escudero v. Mulero, 63 DPR 574; Palermo v. Tribunal, 58 DPR 359; Rivera v Santiago, 56 DPR 381; González v Colón, 49 DPR 557; Brunet v Tribunal, 45 DPR 901; and CRUV v Román, 100 DPR 318.

"In accordance with said doctrine if a defendant in eviction produces sufficient evidence that tends to show that he has some right to occupy the property and that he has title as good as or better that the plaintiff, a conflict of title arises which makes the eviction action improper." This does not occur in the litigation of record. CRUV v Román, 100 DPR 318, 322.

JUDGMENT

Having heard the findings of fact and the conclusions of the precedent law the consolidated complaints of the case of record are hereby GRANTED, and it is ORDERED that all defendants CEASE AND DESIST from hindering the plaintiffs in the possession of the property that is the subject of the present litigation; and to vacate the premises of the land that is the property of the plaintiffs, ESTATE OF MARIO MERCADO RIERA, HPY, INC. and ALFONSO ANTONIO HERNANDEZ ORTIZ, leaving them clear and available for the legitimate owners, plaintiffs, in these cases.

Costs, expenses and attorneys' fees incurred by the plaintiffs are severally imposed on the defendants. The corresponding Memorandum of Costs, Expenses and Attorneys' Fees incurred must be filed no later than ten (10) days from the filing of a copy of the notification of this

Judgment by Edict in the case record.

Notification of this judgment shall be given by notifying the attorneys for the parties and by publishing an (1) Edict in a newspaper of general circulation; this Judgment shall not be final until thirty (30) days have passed from the publication of said Edict; and executable after forty (40) days have elapsed from when the Secretaries of the Department of Social Services and Housing have been notified through certified mail with return receipt requested, according to the provisions of Article 635 of the Civil Procedure Code, in force, (32 LPRA 2836).

The Clerk of this Court shall issue the Writ for ejection once what is provided in Article 636 of the Civil Procedure Code, in force (32 LPRA 2837), has been complied with.

Enter and Notify.

Issued in Ponce, Puerto Rico, June 4, 1991."

FELIPE ORTIZ ORTIZ (SIGNED)

SUPERIOR COURT JUDGE

Translator's note: A rubber stamp for the General Justice Court of the Commonwealth of Puerto Rico, Superior Court, appears on each page of the document.

CERTIFIED TRANSLATION

IN THE SUPERIOR COURT FOR PUERTO RICO,
PONCE DIVISION

UNITED STATES OF AMERICA PRESIDENT OF THE U.S. COMMONWEALTH OF PUERTO RICO, ET AL. ALFONSO A. HERNANDEZ ORTIZ	* *ss: * * * *
Plaintiff v. ESTATE OF MARIO L. MERCADO, ET AL. MODESTO HERNANDEZ VARGAS ET AL. Defendant	*CIVIL NO. CS85-1459 * CS86-2817 * *TEMPORARY INJUNCTION * *EVICTION ACTION FOR *UNLAWFUL DETAINER *AND ACCESSION

****

NOTIFICATION OF JUDGMENT (By Regular Mail)

TO: Atty. Carlos Jesús Pérez Santiago - Box 6930 - Ponce, P.R. 00733 - Atty. Ronald L. Rosenbaum and Freddie Pérez - Box 1292 - Hato Rey, Puerto Rico 00919 - Atty. Gilberto Limardo and Pedro J. Tejada - Box 226 - Ponce Beach Station, Puerto Rico 00734 - Atty. Jaime Rivera Torres - Box 208 - San Germán, Puerto Rico 00753 - Atty. Juan Jesús Ramírez Rivera -

(delivered in person) Box 720 - Mayagüez, Puerto Rico 00709 - Mr. Secretary of the Department of Housing - Box 21365 - Río Piedras, Puerto Rico 00928. Mr. Secretary of the Department of Social Services - Central Office - Box 11398 - Santurce, Puerto Rico 00908.

The CLERK who signs below notifies you that this Court has pronounced judgment in the above-captioned case, dated June 4, 1991, which has been duly entered and filed in the case record for this matter, from which you may be informed as to the details of its terms.

And since you are or represent the party affected by the judgment for which a remedy of appeal may be established, I am addressing this notification to you, having filed a copy thereof in the case record of this case, dated June 4, 1991.

A-110

PONCE, P.R., June 4, 1991.

(Sgd.)PAULITA COLON RIVERA

GENERAL CLERK

[Rubber stamp for the General Justice Court of the Commonwealth of Puerto Rico, Superior Court, Ponce Division]

CERTIFIED TRANSLATION

REPORT TO THE HON. FELIPE ORTIZ ORTIZ

REGARDING CASES CS-85-1459/CS-86-2817

1. ANALYSIS OF THE CONSULTATION OVER LOCATION

The cases at bar arise from the Commonwealth's request to the Board of Planning for eminent domain expropriation in consultation number 86-63-1071-JGU. A sketch of the location appears in said document, drawn over the official topographical quadrangles for Peñuelas and Punta Cuchara. We suppose that said drawing was made based on the Lambert coordinates (NAD 27), since according to what we have been informed a map of the property to be expropriated (MT4-E), graphed in said systems, had been delivered to the Commonwealth.

We have graphed the portion of the property MT4-

E and the HPY Inc. parcel on a copy of the Peñuelas quadrangle (see figure 1) and we also transferred said information to a copy of the sketch submitted to the Board (see figure 2). In comparing the images we notice that the proposed location does not include all of MT4-E and moreover does not include the parcel belonging to HPY Inc. We believe that the sketch is not attempting to draw the property to be expropriated exactly, since the scale of the quadrangle does not allow it. However, the offset of the eastern boundary of the proposed location with regard to the eastern boundary of MT-4E is around 260 meters, which happens to be too big of a mistake to attribute it to impreciseness in the drawing of the map.

Additionally, we must indicate that in the petition for eminent domain expropriation of the property MT4-E [Case KEF-88-148 (1007)] before the Superior Court of Puerto Rico (San Juan Division) it has been indicated that the

cadastral coding for the parcel to be expropriated is 388-000-008-06-000 which in fact defines MT4-E. It is worth noting that the cadastral coding of the parcel belonging to HPY Inc. is 388-000-009-16 (see figures 3A and 3B).

Based on what has been previously stated it is evident that there was never any intention of expropriating the parcel belong to HPY Inc.

2. ANALYSIS OF THE MEASUREMENT OF THE PROPERTY TO BE EXPROPRIATED

The measurement of the property to be expropriated was assigned to Land Surveyor Ismael Cordero (Lic. #1496). The land surveyor Cordero completed said work in 1987 and submitted his map to the Rural Housing Administration (AVR-initials in Spanish). Said map was used by the AVR to define the parcel to be expropriated. The land surveyor Cordero includes in his measurement map a location map

also graphed on the official quadrangle on the Lambert coordinates (NAD 27). If we compare this drawing with the ones previously mentioned we see that the property measured by land surveyor Cordero includes part of the parcel belonging to HPY, Inc. (See figure 4). Also notice that the southern boundary of the property (which is the stream) does not coincide with the stream graphed on the official quadrangle. The difference in the location of both streams is from 20 to 60 meters on the scale of the map.

We believe that part of the problem arises due to an incorrect identification of points 3-ORO and 23-ORO and the fact that for some reason a conscientious study of the deeds of the property involved was not done. Said study would have indicated that the property MT4-E originally bordered the property Punto Oro at "four alignments that" totalled "one thousand four hundred and forty-seven point nine meters." It

also would have indicated that lots A, B, C, D and E that make up the parcel belonging to HPY, Inc. border MT-4-E for two alignments that total 1282.415 meters. The difference between this figure and the previous one (1447.9 m) are some 165.5 meters that are the other two alignments that would be missing. These two alignments are part of the border with Punto Oro. The measurement map of land surveyor Cordero indicates two alignments with Punto Oro, arriving at the stream, totalling 1073.09 meters. Nevertheless, the map of Punto Oro indicates that it does not border the stream. We have no other alternative but to conclude that boundary taken by land surveyor Cordero is not correct.

3. POSITIVE IDENTIFICATION OF POINT 3-ORO

As we indicated above, the evidence also indicates that the points 3-ORO and 2-ORO taken by Mr. Cordero were not correct. In order to

corroborate said thesis an inverse trisection was taken at the point which was indicated to us as the correct 3-ORO. For corroboration we relied on the Lambert coordinates (NAD 27) that appeared in the maps of land surveyor Hernán Lugo Rodríguez and architect Carlos A. Buxó (original data of engineer Rafael Dosal Lines), which differ by 4 millimeters (X) and 3 millimeters (Y) from each other. Nine vertices were observed using a transit WILD-T2 with a direct reading of 1" arc, reading at a direct and inverted position (see figures 5 and 6). Of these nine vertices of the new system NAD 83, 2 were eliminated since apparently they had changed positions since 1965.

The initial calculation was made with the vertices from the Caja de Muertos lighthouse, the one at Cayo Cardona and the Don Q. chimney. Then observation equations were formulated for the 7 vertices and an adjustment for minimum squares was carried out. After the adjustment

the rectangular coordinates (X,Y) were transformed to geographical coordinates (latitude and longitude) and were modified by the change of the spheroid through an interpolation between the vertices ETRA PRS. PONCE 2 AND CAYO CARDONA EXCENTRICA (see figure 7). After making these transformations for coordinates NAD 27 the 4 data were compared, resulting in variations in the order of 0.07 and 0.15 arc seconds in the positions. Therefore, we conclude that this is definitely the correct point and the line defined by points 2- and 3-ORO is the northern boundary of the parcel belonging to HPY, Inc., as well as the line 2-ORO to 1-ORO defines its western boundary. (See appendix I for the corroboration of the computations).

4. STATION PUNTO ORO IDENTIFIED BY LAND SURVEYOR CORDERO

The measurement performed by land surveyor

Cordero is also given in Lambert coordinates (NAD 27) and according to the evidence that he presents in his map he used an inverse trisection of the vertices of the Mercedita chimney, Ponce (he doesn't indicate whether it is Ponce 2 or Ponce US GS), Caja de Muertos and the Lighthouse of Cardona island to locate its initial station AVR. However, in his computations which were given to us the location of AVR is made by an intersection from vertex Ponce 2 and the Cardona island Lighthouse. In verifying the computations we were able to notice that one of the vertices used was Ponce USGS and not Ponce 2. Once AVR had been located, the point that land surveyor Cordero identified as 3-ORO was defined. Its coordinates, obtained by Cordero differ from those obtained by land surveyor Lugo Torres/Lugo Rodríguez and engineer Dosal Lines for some 300 meter at X and some 100 meters at Y, which translates into 3 arc seconds in latitude and 10 arc seconds in longitude. Undoubtedly, the

point taken as 3-ORO by Cordero is not correct and therefore 2-ORO is not correct either. It is worth noting that the line 2- at 3-ORO (Cordero) is almost parallel to 2- at 3-ORO (Lugo Torres/Lugo Rodríguez, Dosal Lines).

5. IDENTIFICATION OF PUNTO 1-ORO

Figure 8 has been prepared with the data from the measurement map of land surveyor Cordero, the data from the maps of the Punto Oro Development prepared by engineer Dosal Lines and by land surveyors Lugo Torres/Lugo Rodríguez and the measurement map of the industrial area of Punto Oro prepared by engineer Dosal Lines. This shows the lapping of the parcel measured by Cordero with the property belonging to HPY, Inc. It also shows that the eastern boundary of that parcel coincides approximately with the slope that borders Punto Oro for which reason this means that the construction of the development very probably occupied part of the property

belonging to HPY, Inc. and MT4-E.

CONCLUSION

As may be deduced from all of the evidence presented, it is obvious to conclude that a mistake was made in including a substantial part of the property belonging to HPY, Inc. in the parcel that the Commonwealth proposes to expropriate from the Mario Mercado Estate to divide into lots in the Punta Diamante area. It is also apparent that there was an error in the location of the stream that forms the southern boundary of said parcel, since it does not agree with the position given for it in the official Peñuelas quadrangle. The first mistake I believe is due mainly to an erroneous identification of points 2- and 3-ORO. The second is more difficult to find and explanation for, without more complete information of the work performed by Land Surveyor Cordero.

Today (June 15) I received over the phone the rectified position of a vertex that Land Surveyor Hernán Lugo Rodríguez obtained this time through a more exact job, since the original job was performed through stadiametry. This vertex is sufficiently close to 3-ORO and if its offset is applied at this point then its position would differ from the one found through inverse trisection by only 0.016 arc seconds in latitude and 0.091 arc seconds in longitude, much better than before.

In order for the 200 cuerda parcel that is going to be expropriated from the Mercado Estate to be defined, I suggest taking as a basis the Feliciano and Associates map and defining a parcel of the size indicated, and if necessary modify these calculated boundary in order to not interfere with the already established possession lines. In this way the cost to the public treasury is substantially reduced.

CERTIFIED TRANSLATION

FORM DJ-103

REV. 8/60

CERTIFICATION NOTEBOOK

COMMONWEALTH OF PUERTO RICO

DEPARTMENT OF JUSTICE

PROPERTY REGISTRY

SECTION II FOR PONCE

[Seal for the Property Registry]

CERTIFICATION

concerning plot number (35,564) 5868 recorded on page 159 of volume (1263) 521 of Ponce II.

Issued on the 22nd of October of 1987 at the behest of Atty. Ronald L. Rosenbaum

A-123

Commonwealth of Puerto Rico

Department of Justice

Property Registry

Section II for Ponce

ATTORNEY JOSE L. PURCELL TERRON, Property Registrar for Puerto Rico, Section II for Ponce and its Mortgage Demarcation:

I C E R T I F Y

-----That at the request of Atty. Ronald L. Rosenbaum, we have examined the legible books for this Registry in our custody, and it APPEARS from these:

-----FIRST: That the piece of property: previously number 35,564 for Ponce I, presently number 5868 for Ponce II appears described on the back of page 165 of the volume: previously 1263 for Ponce I, presently 521 for Ponce II, 3rd entry as follows:

RURAL: A parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of TWENTY-SIX POINT SIX THOUSAND SEVEN HUNDRED TWENTY CUERDAS, equivalent to ONE HUNDRED FOUR THOUSAND EIGHT HUNDRED FORTY POINT THREE THOUSAND EIGHT HUNDRED EIGHTY-THREE SQUARE METERS (104,840.3883). Bounded on the North by part of the main property, in two directions from which the ninety cuerdas were subdivided of which the present is a remainder, belonging to the Trusteeship of the Mario Mercado & Sons Partnership, in the first direction for a distance of nine hundred fifty-six point zero fifteen meters, and in the second direction for a distance of two hundred seventy-three point four hundred ninety-six meters; on the South, and in one sole direction and for a distance of one thousand one hundred eighty-eight point six hundred seventy meters by the parcel

described with the letter "E" on the map prepared by the engineer, Rafael Dosal Lines; on the East, in one sole direction and for a distance of three point five hundred seventy-four meters, by the Punto Oro Development; and on the West, in one sole direction and a distance of one hundred two point eighty-five meters by land belonging to the property known as the Hacienda Matilde, property belonging to the Trusteeship for the Mario Mercado & Sons Partnership and from which the ninety cuerdas parcel was subdivided, of which this is a remainder. This parcel is marked "A" on the subdivision map made by the Engineer, Rafael Dosal Lines.

-----The parcel described herein is the remainder of the one with this number after subtracting from its area of ninety cuerdas the parcels that are subdivided and indicated in the margin notes from the prior first entry.

-----SECOND: That the piece of property described above is entered on behalf of H.P.Y. INC., a corporation organized and existing under the laws of the State of Delaware, represented herein by William Joseph Luckerath, its legal representative, of legal age, divorced, an attorney and resident of Santurce, Puerto Rico, with accredited authority, who acquired it by way of purchase at a public auction for a price of $39,655.00; in virtue of deed number 33, executed in San Juan, on March 12, 1985, before the notary Rafael E. Robles Díaz; (as referred to in the en) I mean, which together with other supplementary documents resulted in the 7th entry of said property on the back of page 169 of the previously mentioned volume.

-----THIRD: That the status of said property as far as encumbrances and liens is as follows:

-----BY WAY OF ORIGIN: From the 1st entry of said property made on page 159 of the volume:

previously 1263 for Ponce I, presently 521 for Ponce II, it appears that this property is subject to the following encumbrances due to its origin: Entry for a complaint for dissolution of partnership, civil case number CS-57-2295 and rights-of-way in the name of the Commonwealth of Puerto Rico.

-----ON ITS OWN BEHALF: Said property is found to be FREE OF ENCUMBRANCES:

O B S E R V A T I O N

That on page 22 of volume I of the Registry of Liens for the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes (prior owner of this property) for a piece of urban property located in Canas Ward with an area of 90 cuerdas, and with the following boundaries: NW: Parcel no. 2; SW: 410-0000-010-01; SE: Parcel no. 15 and NE: Parcel no. 15 to answer to the amounts of:

$76,670.28 for taxes; $7,666.96 for surcharges and $18,606.36 for costs for a total of: $102,943.60, due on property taxes; entered with the order number: 088, case number: 630106409; date of presentation and recording: December 26, 1979 and date of the certificate: December 26, 1979.

-----That on page 99 of volume I of the Registry of Liens due to the Commonwealth of Puerto Rico of Ponce II there is a lien entered against James T. Barnes of P.R. Inc., (prior owner of this property) on a piece of rural property, located in Punto Oro - Main Property, with an area of 90 cuerdas, and with the following boundaries: North: Municipal Dump and Jardines del Caribe Development; South: Road from Ponce to Guayanilla; East: Canas River and West: Pastillo River; to answer to the sums of $76,670.28 for taxes; $17,976.12 for surcharges and $7,666.96 for costs, for a total of: $102,313.36 due for property taxes; entered with

the order number: 0394; date of presentation and recording: October 20, 1980 and date of the certificate, October 17, 1980.

-----From the indexes of the Registry of Liens owed to the Commonwealth of Puerto Rico of Ponce I, numbers 65, 66, 67, 68, 69 and 70 for Ponce I and numbers 1, 2, 3, 4 and 5 for Ponce II; for the indexes of Federal Liens number 1 for Ponce I and number 1 for Ponce II and from the indexes of the Registry of Judgments number 2 for Ponce I and number 1 for Ponce II, the specific name of H.P.Y. Inc. DOES NOT APPEAR, looking under the letter "H" as an encumbered debtor.

-----No certification is given as to other particulars.

-----AND FOR THE RECORD, in accordance with what has been requested, I issue the present document which I sign, seal and initial in Ponce, Puerto Rico at three p.m. on October 22, 1987.

(Sgd./illegible)

Fees: $6.00 Atty. José L. Purcell Terrón

Comp. no. C-1894303-$6.00 Property Registrar

Act 3/August 12, 1982 Ponce Section II

Eb

[Department of Justice seal]

CERTIFIED TRANSLATION

FORM DJ-103

REV. 8/60

CERTIFICATION NOTEBOOK

COMMONWEALTH OF PUERTO RICO

DEPARTMENT OF JUSTICE

PROPERTY REGISTRY

SECTION II FOR PONCE

[Seal for the Property Registry]

CERTIFICATION

concerning plot number (39,436) 5867 recorded on page 115 of volume (1374) 578 of Ponce II.

Issued on the 22nd of October of 1987 at the behest of Atty. Ronald L. Rosenbaum

A-132

Commonwealth of Puerto Rico

Department of Justice

Property Registry

Section II for Ponce

ATTORNEY JOSE L. PURCELL TERRON, Property Registrar for Puerto Rico, Section II for Ponce and its Mortgage Demarcation:

I C E R T I F Y

-----That at the request of Atty. Ronald L. Rosenbaum, we have examined the legible books for this Registry in our custody, and it APPEARS from these:

-----FIRST: That the piece of property: previously number 39,436 for Ponce I, presently number 5867 for Ponce II appears described on page 115 of the volume: previously 1374 for Ponce I, presently 578 for Ponce II, 1st entry as follows:

RURAL: Piece of land located in Canas Ward in the municipal district of Ponce, Puerto Rico, with a surface area of ONE HUNDRED ELEVEN THOUSAND THREE HUNDRED FORTY-SEVEN SQUARE METERS AND FIFTY-FIVE CENTIMETERS (111,347.55) equivalent to TWENTY-EIGHT AND THREE THOUSAND THREE HUNDRED THIRTY-THREE TEN-THOUSANDTHS CUERDAS (28.3333) bounded on the North by the remaining sixty-one point six thousand six hundred sixty-seven cuerdas of the original ninety cuerdas, for a distance of one thousand one hundred thirty-nine point five hundred eighty-seven meters (1,139.587) and in a direction of seventy-eight degrees, forty-six minutes and fifty-four seconds North by East. On the South by land belonging to the Punto de Oro Development for a distance of one thousand ninety-five point six hundred eighteen meters (1,095.618) and a direction of seventy-eight degrees, fifty-

seven minutes and fifty-three seconds South by West. On the East, by land belonging to the Punto Oro Development, for a distance of sixty-five point nine hundred thirty-eight (65.938) meters in a direction of four degrees, two minutes and three seconds South by East, and a distance of thirty-seven point zero seventy-two meters (37.072), in a direction of three degrees, forty-one minutes and forty-seven seconds South by West. On the West, by land belonging to the Mario Mercado and Sons Partnership, from which the ninety cuerda parcel was subdivided from which the parcel described herein is subdivided, for a distance of one hundred one point one hundred eighty-five meters (101.185) in a direction of twenty-six degrees, thirteen minutes and seven seconds North by West.

-----SECOND: That the piece of property

described above is entered on behalf of H.P.Y. INC., a corporation organized and existing under the laws of the State of Delaware, represented in the execution by Mildred Ulmo, of legal age, single, a secretary and resident of Carolina, with accredited authority, who acquired it by way of purchase for a price of $282,000.00; in virtue of deed number 40, executed in San Juan, on November 10, 1981, before the notary William Joseph Luckeroth, written in the English language; as referred to in the 6th entry of said property, made on page 52 of volume 705 for Ponce II.

-----THIRD: That the status of said property as far as encumbrances and liens is as follows:

-----BY WAY OF ORIGIN: From the 1st entry of said property made on page 115 of the volume: previously 1374 for Ponce I, presently 578 for Ponce II, it appears that this property is subject to the following encumbrances due to its

origin: Entry for a complaint for dissolution of partnership, civil case number CS-57-2295 and rights-of-way in the name of the Commonwealth of Puerto Rico.

-----ON ITS OWN BEHALF: Said property is found to be FREE OF ENCUMBRANCES:

O B S E R V A T I O N

-----That on page 22 of volume I of the Registry of Liens for the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes (prior owner of this property) for a piece of urban property located in Canas Ward with an area of 90 cuerdas, and with the following boundaries: NW: Parcel no. 2; SW: 410-0000-010-01; SE: Parcel no. 15 and NE: Parcel no. 15 to answer to the amounts of: $76,670.28 for taxes; $7,666.96 for surcharges and $18,606.36 for costs, for a total of: $102,943.60, due on property taxes; entered with

the order number: 088, case number: 630106409; date of presentation and recording: December 26, 1979 and date of the certificate: December 26, 1979.

-----That on page 99 of volume I of the Registry of Liens due to the Commonwealth of Puerto Rico of Ponce II there is a entry entered against James T. Barnes of P.R. Inc., (prior owner of this property) on a piece of rural property, Punto Oro Main Property, with an area of 90 cuerdas, and with the following boundaries: North: Municipal Dump and Jardines del Caribe Development; South: Road from Ponce to Guayanilla; East: Canas River and West: Pastillo River; to answer to the sums of $76,670.28 for taxes; $17,976.12 for surcharges and $7,666.96 for costs, for a total of: $102,313.36 due for property taxes; entered with the order number: 0394; date of presentation and recording: October 20, 1980 and date of the certificate, October 17, 1980.

-----From the indexes of the Registry of Liens owed to the Commonwealth of Puerto Rico of Ponce I, numbers 65, 66, 67, 68, 69 and 70 for Ponce I and numbers 1, 2, 3, 4 and 5 for Ponce II; for the indexes of Federal Liens number 1 for Ponce I and number 1 for Ponce II and from the indexes of the Registry of Judgments number 2 for Ponce I and number 1 for Ponce II, the specific name of H.P.Y. Inc. DOES NOT APPEAR, looking under the letter "H," as an encumbered debtor.

-----No certification is given as to other particulars.

-----AND FOR THE RECORD, in accordance with what has been requested, I issue the present document which I sign, seal and initial in Ponce, Puerto Rico at three p.m. on October 22, 1987.

(Sgd./illegible)

Fees: $6.00 Atty. José L. Purcell Terrón
Comp. no. C-1894303-$6.00 Property Registrar
Act 3/August 12, 1982 Ponce Section II
Eb
[Department of Justice seal]

CERTIFIED TRANSLATION

FORM DJ-103
REV. 8/60
CERTIFICATION NOTEBOOK

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF JUSTICE
PROPERTY REGISTRY
SECTION II FOR PONCE
[Seal for the Property Registry]

CERTIFICATION

concerning plot number (43,077) 5869 recorded on page 111 of volume (1440) 598 of Ponce II.

Issued on the 22nd of October of 1987 at the behest of Atty. Ronald L. Rosenbaum

Commonwealth of Puerto Rico

Department of Justice

Property Registry

Section II for Ponce

ATTORNEY JOSE L. PURCELL TERRON, Property Registrar for Puerto Rico, Section II for Ponce and its Mortgage Demarcation:

I C E R T I F Y

-----That at the request of Atty. Ronald L. Rosenbaum, we have examined the legible books for this Registry in our custody, and it APPEARS from these:

-----FIRST: That the piece of property: previously number 43,077 for Ponce I, presently number 5869 for Ponce II appears described on page 111 of the volume: previously 1440 for Ponce I, presently 598 for Ponce II, 1st entry as follows:

RURAL: parcel of land located in Canas Ward ~~in the~~ municipal district of Ponce, Puerto Rico with an area of ELEVEN POINT SIX THOUSAND SIX HUNDRED SIXTY-SIX CUERDAS equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FIFTY-FOUR POINT FOUR THOUSAND FORTY-SIX SQUARE METERS (45,854.4046), bounded on the North by a parcel identi-

fied by the letter (A) on the subdivision map made by the engineer, Rafael Dosal Lines, in other words, with more land from the ninety cuerda parcel from which this parcel is subdivided, said boundary being a single alignment of one thousand one hundred fifty-five point three hundred fifty (1,155.350) meters; on the South by one single alignment of one thousand one hundred thirty-nine point five hundred eighty-seven meters, bounded by land subdivided from the ninety cuerda parcel identified as Parcel "B" on the above-mentioned map made by the engineer, Rafael Dosal Lines; on the East, by one single alignment of forty point fifteen meters bounded by the Punto Oro Development, and on the West by one single alignment of forty-one point five hundred four (41.504) meters, bounded by more land from the main parcel known as Hacienda Matilde, property belonging to the Mario Mercado and Sons

Partnership.

-----In the document that gave rise to the 2nd entry of said property on the back of page 112 of the previously mentioned volume it is said that it is bound on the East by one single alignment of forty-one point five hundred four (41.504) meters bounded by more land from the main parcel known as Hacienda Matilde, property belonging to the Mario Mercado and Sons Partnership, from which the ninety cuerda parcel was subdivided, omitting the Western boundary.

-----SECOND: That the piece of property described above is entered on behalf of H.P.Y. INC., a corporation organized and existing under the laws of the State of Delaware, represented in the execution by Mildred Ulmo, of legal age, single, a secretary and resident of Carolina, with accredited authority, who acquired it by way of purchase for a price of $113,000.00; in virtue of deed number 40, executed in San Juan,

on November 10, 1981, before the notary William Joseph Luckeroth, written in the English language; as referred to in the 6th entry of said property, made on page 116 of the previously mentioned volume 705.

-----THIRD: That the status of said property as far as encumbrances and liens is as follows:

-----BY WAY OF ORIGIN: From the 1st entry of said property previously mentioned, it appears that this property is subject to the following encumbrances due to its origin: Entry for a complaint for dissolution of partnership, civil case number CS-57-2295 and rights-of-way in the name of the Commonwealth of Puerto Rico.

-----ON ITS OWN BEHALF: Said property is found to be FREE OF ENCUMBRANCES:

O B S E R V A T I O N

-----That on page 22 of volume I of the Registry of Liens for the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes (prior owner of this property) for a piece of urban property located in Canas Ward with an area of 90.00 cuerdas, and with the following boundaries: NW: Parcel no. 2; SW: 410-0000-010-01; SE: Parcel no. 15 and NE: Parcel no. 15 to answer to the amounts of: $76,670.28 for taxes; $7,666.96 for surcharges and $18,606.36 for costs, for a total of: $102,943.60, due on property taxes; entered with the order number: 088, case number: 630106409; date of presentation and recording: December 26, 1979 and date of the certificate: December 26, 1979.

-----That on page 99 of volume I of the Registry of Liens due to the Commonwealth of Puerto Rico of Ponce II there is a lien entered against

James T. Barnes of P.R. Inc., (prior owner of this property) on a piece of rural property, located in Punto Oro - Main Property, with an area of 90 cuerdas, and with the following boundaries: North: Municipal Dump and Jardines del Caribe Development; South: Road from Ponce to Guayanilla; East: Canas River and West: Pastillo River; to answer to the sums of $76,670.28 for taxes; $17,976.12 for surcharges and $7,666.96 for costs, for a total of: $102,313.36 due for property taxes; entered with the order number: 0394; date of presentation and recording: October 20, 1980 and date of the certificate, October 17, 1980.

-----From the indexes of the Registry of Liens owed to the Commonwealth of Puerto Rico of Ponce I, numbers 65, 66, 67, 68, 69 and 70 for Ponce I and numbers 1, 2, 3, 4 and 5 for Ponce II; for the indexes of Federal Liens number 1 for Ponce I and number 1 for Ponce II and from the indexes of the Registry of Judgments number 2 for Ponce

I and number 1 for Ponce II, the specific name of H.P.Y. Inc. DOES NOT APPEAR, looking under the letter "H," as an encumbered debtor.

-----No certification is given as to other particulars.

-----AND FOR THE RECORD, in accordance with what has been requested, I issue the present document which I sign, seal and initial in Ponce, Puerto Rico at three p.m. on October 22, 1987.

(Sgd./illegible)

Fees: $6.00 Atty. José L. Purcell Terrón

Comp. no. C-1894303-$6.00 Property Registrar

Act 3/August 12, 1982 Ponce Section II

eb

[Department of Justice seal]

CERTIFIED TRANSLATION

FORM DJ-103

REV. 8/60

CERTIFICATION NOTEBOOK

COMMONWEALTH OF PUERTO RICO

DEPARTMENT OF JUSTICE

PROPERTY REGISTRY

SECTION II FOR PONCE

[Seal for the Property Registry]

CERTIFICATION

concerning plot number (44,915) 5870 recorded on page 282 of volume (1488) 625 of Ponce II.

Issued on the 23rd of October of 1987 at the behest of Atty. Ronald L. Rosenbaum

A-148

Commonwealth of Puerto Rico

Department of Justice

Property Registry

Section II for Ponce

ATTORNEY JOSE L. PURCELL TERRON, Property Registrar for Puerto Rico, Section II for Ponce and its Mortgage Demarcation:

I C E R T I F Y

-----That at the request of Atty. Ronald L. Rosenbaum, we have examined the legible books for this Registry in our custody, and it APPEARS from these:

-----FIRST: That the piece of property: previously number 44,915 for Ponce I, presently number 5870 for Ponce II appears described on page 282 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II, 1st entry as follows:

RURAL: Parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of forty-five thousand eight hundred forty-nine point three thousand five hundred thirty-nine square meters (45,849.3539), equivalent to eleven point six hundred sixty-six (11.666) cuerdas. Bounded on the North, in one single direction and for a distance of one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "A" on the map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of one thousand one hundred fifty-five point three hundred fifty meters by the parcel marked "C" on the above-mentioned map that was subdivided from the ninety cuerda parcel from which remainder this parcel is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for

a distance of thirty-nine point four hundred eighty-four meters; and on the West, in a single direction and for a distance of forty-one point zero sixty-five meters, by property from the Hacienda Matilde, belonging to the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from which remainder this parcel is subdivided.

-----SECOND: That the piece of property described above is entered on behalf of H.P.Y. INC., a corporation organized and existing under the laws of the State of Delaware, represented in the execution by Mildred Ulmo, of legal age, single, a secretary and resident of Carolina, with accredited authority, who acquired it by way of purchase for a price of $113,000.00; in virtue of deed number 40, executed in San Juan, on November 10, 1981, before the notary William Joseph Luckeroth, written in the English language; as referred to in the 6th entry of

said property, made on the back of page 286 of the previously mentioned volume.

-----THIRD: That the status of said property as far as encumbrances and liens is as follows:

-----BY WAY OF ORIGIN: From the 1st entry of said property that was previously mentioned, it appears that this property is subject to the following encumbrances due to its origin: Notice of a complaint for Dissolution of Partnership, and rights-of-way in the name of the Commonwealth of Puerto Rico.

-----ON ITS OWN BEHALF: Said property is found to be FREE OF ENCUMBRANCES:

O B S E R V A T I O N

-----That on page 22 of volume I of the Registry of Liens for the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James

T. Barnes (prior owner of this property) for a piece of urban property located in Canas Ward with an area of 90.00 cuerdas, and with the following boundaries: NW: Parcel no. 2; SW: 410-0000-010-01; SE: Parcel no. 15 and NE: Parcel no. 15; to answer to the amounts of: $76,670.28 for taxes; $7,666.96 for surcharges and $18,606.36 for costs, for a total of: $102,943.60, due on property taxes; entered with the order number: 088, case number: 630106409; date of presentation and recording: December 26, 1979 and date of the certificate: December 26, 1979.

-----That on page 99 of volume I of the Registry of Liens due to the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes of P.R. Inc., (prior owner of this property) on a piece of rural property, Punto Oro Main Property, with an area of 90 cuerdas, and with the following boundaries: North: Municipal Dump and Jardines del Caribe

Development; South: Road from Ponce to Guayanilla; East: Canas River and West: Pastillo River; to answer to the sums of $76,670.28 for taxes; $17,976.12 for surcharges and $7,666.96 for costs, for a total of: $102,313.36 due for property taxes; entered with the order number: 0394; date of presentation and recording: October 20, 1980 and date of the certificate, October 17, 1980.

-----From the indexes of the Registry of Liens owed to the Commonwealth of Puerto Rico for Ponce I, numbers 65, 66, 67, 68, 69 and 70 of Ponce I and numbers 1, 2, 3, 4 and 5 for Ponce II; for the indexes of Federal Liens number 1 for Ponce I and number 1 for Ponce II and from the indexes of the Registry of Judgments number 2 for Ponce I and number 1 for Ponce II, the specific name of H.P.Y. Inc. DOES NOT APPEAR, looking under the letter "H," as an encumbered debtor.

-----No certification is given as to other particulars.

-----AND FOR THE RECORD, in accordance with what has been requested, I issue the present document which I sign, seal and initial in Ponce, Puerto Rico at three p.m. on October 23, 1987.

(Sgd./illegible)

Fees: $6.00 Atty. José L. Purcell Terrón

Comp. no. C-1894303-$6.00 Property Registrar

Act 3/August 12, 1982 Ponce Section II

eb

[Department of Justice seal]

CERTIFIED TRANSLATION

FORM DJ-103

REV. 8/60

CERTIFICATION NOTEBOOK

COMMONWEALTH OF PUERTO RICO

DEPARTMENT OF JUSTICE

PROPERTY REGISTRY

SECTION II FOR PONCE

[Seal for the Property Registry]

CERTIFICATION

concerning plot number (44,916) 9463 recorded on page 290 of volume (1488) 625 of Ponce II.

Issued on the 23rd of October of 1987 at the behest of Atty. Ronald L. Rosenbaum

A-156

Commonwealth of Puerto Rico

Department of Justice

Property Registry

Section II for Ponce

ATTORNEY JOSE L. PURCELL TERRON, Property Registrar for Puerto Rico, Section II for Ponce and its Mortgage Demarcation:

I C E R T I F Y

-----That at the request of Atty. Ronald L. Rosenbaum, we have examined the legible books for this Registry in our custody, and it APPEARS from these:

-----FIRST: That the piece of property: previously number 44,916 for Ponce I, presently number 9463 for Ponce II appears described on page 290 of the volume: previously 1488 for Ponce I, presently 625 for Ponce II, 1st entry as follows:

RURAL: Parcel of land located in Canas Ward in the municipal district of Ponce, Puerto Rico with a surface area of ELEVEN POINT SIX HUNDRED SIXTY-SIX (11.666) CUERDAS equivalent to FORTY-FIVE THOUSAND EIGHT HUNDRED FORTY-NINE POINT THREE THOUSAND FIVE HUNDRED THIRTY-NINE SQUARE METERS. Bounded on the North, in one single direction and for a distance of one thousand eighty-eighty point six hundred seventy meters by the parcel marked "A" on the subdivision map made by the engineer, Rafael Dosal Lines; on the South, in a single direction and for a distance of one thousand one hundred seventy point nine hundred seventeen meters by the parcel marked "D" on the above-mentioned subdivision map that was subdivided from the ninety cuerda parcel from which remainder this parcel is subdivided; on the East, in a single direction by land belonging to the Punto Oro Development for

a distance of thirty-eight point nine hundred ninety-three meters; and on the West, in a single direction and for a distance of forty point two hundred forty-three meters, by property from the Hacienda Matilde, belonging to the Trusteeship for the Mario Mercado and Sons Partnership from which the ninety cuerdas were subdivided from which remainder this parcel is subdivided.

-----SECOND: That the piece of property described above is entered on behalf of H.P.Y. INC., a corporation organized and existing under the laws of the State of Delaware, represented in the execution by William Joseph Luckeroth, its legal representative, of legal age, divorced, an attorney and resident of Santurce, with accredited authority, who acquired it by way of purchase at a public auction for a price of $17,345.00; in virtue of deed number 33, executed in San Juan, on March 12, 1985, before

the notary Rafael E. Robles Díaz, which together with other supplementary documents gave rise to the 4th entry of said property, made on the back of page 292 of the previously mentioned volume.

-----THIRD: That the status of said property as far as encumbrances and liens is as follows:

-----BY WAY OF ORIGIN: From the 1st entry of said property that was previously mentioned, it appears that this property is subject to the following encumbrances due to its origin: Notice of a complaint for Dissolution of Partnership, and rights-of-way in the name of the Commonwealth of Puerto Rico.

-----ON ITS OWN BEHALF: Said property is found to be FREE OF ENCUMBRANCES:

O B S E R V A T I O N

-----That on page 22 of volume I of the Registry

of Liens for the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes (prior owner of this property) for a piece of urban property located in Canas Ward with an area of 90.00 cuerdas, and with the following boundaries: NW: Parcel no. 2; SW: 410-0000-010-01; SE: Parcel no. 15 and NE: Parcel no. 15; to answer to the amounts of: $76,670.28 for taxes; $7,666.96 for surcharges and $18,606.36 for costs, for a total of: $102,943.60, due on property taxes; entered with the order number: 088, case number: 630106409; date of presentation and recording: December 26, 1979 and date of the certificate: December 26, 1979.

-----That on page 99 of Volume I of the Registry of Liens due to the Commonwealth of Puerto Rico for Ponce II there is a lien entered against James T. Barnes of P.R. Inc., (prior owner of this property) on a piece of rural property, Punto Oro Main Property, with an area of 90

cuerdas, and with the following boundaries:

North: Municipal Dump and Jardines del Caribe Development; South: Road from Ponce to Guayanilla; East: Canas River and West: Pastillo River; to answer to the sums of $76,670.28 for taxes; $17,976.12 for surcharges and $7,666.96 for costs, for a total of: $102,313.36 due for property taxes; entered with the order number: 0394; date of presentation and recording: October 20, 1980 and date of the certificate, October 17, 1980.

-----From the indexes of the Registry of Liens owed to the Commonwealth of Puerto Rico for Ponce I, numbers 65, 66, 67, 68, 69 and 70 for Ponce I and numbers 1, 2, 3, 4 and 5 for Ponce II; for the indexes of Federal Liens number 1 for Ponce I and number 1 for Ponce II and from the indexes of the Registry of Judgments number 2 for Ponce I and number 1 for Ponce II, the specific name of H.P.Y. Inc. DOES NOT APPEAR,

looking under the letter "H," as an encumbered debtor.

-----No certification is given as to other particulars.

-----AND FOR THE RECORD, in accordance with what has been requested, I issue the present document which I sign, seal and initial in Ponce, Puerto Rico at three p.m. on October 23, 1987.

(Sgd./illegible)

Fees: $6.00 Atty. José L. Purcell Terrón

Comp. no. C-1894303-$6.00 Property Registrar

Act 3/August 12, 1982 Ponce Section II

eb

[Department of Justice seal]

Supreme Court, U.S.
FILED
OCT 13 1993
OFFICE OF THE CLERK

No. 93-446

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HPY, INC.,
Petitioner,

v.

ELECTRIC POWER AUTHORITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

HÉCTOR MELÉNDEZ CANO
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BEST AVAILABLE COPY

LIST OF PARTIES AND STATEMENT OF CORPORATE AFFILIATIONS

Respondent Puerto Rico Aqueduct and Sewer Authority (hereinafter, "PRASA") incorporates herein the List of Parties included at p. iii of the Petition for a Writ of Certiorari.

PRASA is a public corporation and an autonomous government instrumentality of the Commonwealth of Puerto Rico, created by Act No. 40 of May 1, 1945, as amended [22 Laws of Puerto Rico Annotated, § 141 *et seq.*].

PRASA has no parent or affiliate corporations or companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-446

HPY, INC.,

Petitioner,

v.

ELECTRIC POWER AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

Respondent Puerto Rico Aqueduct and Sewer Authority (hereinafter, "PRASA") respectfully opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review the judgment entered on April 13, 1993 and the order denying a rehearing entered on May 11, 1993 (hereinafter, "the Petition").

STATEMENT OF THE CASE

Respondent PRASA is a public corporation and governmental instrumentality of the Commonwealth of Puerto Rico, whose purpose is to provide water and wastewater sewage services to the people of Puerto Rico. *See*, 22 L.P.R.A. § 141 *et seq.* On April 16, 1992, Petitioner HPY, Inc. (hereinafter "HPY" or "Petitioner") filed a complaint (hereinafter "the Complaint") in the United

States District Court for the District of Puerto Rico ("the District Court") seeking recovery of at least $60,000,000 in compensatory and punitive damages from PRASA and other defendants. As respects PRASA, the only discernible allegations of the Complaint are:

> (a) that PRASA, "acting under color of state law engaged in unlawful, illegal, discriminatory and abusive acts, which . . . deprived [petitioner] of their [sic] property without substantive and procedural due process of law, by ignoring its own rules and regulations and the law that created it." Complaint par. 5. Pet. App. A23-A24.
>
> (b) that "on or about 1985, squatters, without valid title or authorization from the Plaintiff started massive land invasions on [petitioner's] properties. The squatters, also Defendants of [sic] this suit, encouraged and abetted by the other Defendants, proceeded to construct or build shacks and houses on Plaintiff's properties." Complaint, par. 8, Pet. App. A32.

On July 10, 1992, PRASA filed a motion to dismiss, alleging, *inter alia*, that the Complaint failed to state a claim against PRASA. Other codefendants filed similar motions and HPY filed several oppositions thereto. HPY, rather than request leave of court to file an amended complaint, argued in its oppositions to the motions to dismiss that the allegations in the Complaint were sufficient to state a claim. As respects PRASA, HPY alleged that the aiding and abetting consisted in the supply of water services to the squatters.

On October 6, 1992, the District Court entered an Opinion and Order dismissing the Complaint for failure to satisfy the notice pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure at its most basic level. The District Court assumed that PRASA's conduct alleged in the complaint was the supply of water services to the squatters, as amplified by HPY in its oppositions to the motions to dismiss. *See* Pet. 12; Pet. App. A14.

On January 18, 1993, HPY appealed the District Court's judgment to the Court of Appeals for the First Circuit. The appeal basically raised a single point, to wit: that the District Court abused its discretion in dismissing the Complaint with prejudice, without opportunity to amend and in disregard of the averments in petitioner's oppositions to the several motions to dismiss and other documents in the record.

PRASA argued on appeal, *first*, that the Complaint, even if aided by HPY's other filings before the District Court, was devoid of facts upon which to base a claim as respects PRASA; *second*, that the question of whether it might have been an error for the District Court to have denied leave to amend was not properly before the Court of Appeals because HPY never requested such leave; and *third*, that even if the Complaint could somehow be construed as an invasion of HPY's land by PRASA, it was insufficient to state a cognizable claim under 42 U.S.C. § 1983 in view of the fact that state remedies were available, citing the holdings in *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), *Culebras Enterprises Corp.* v. *Rivera Ríos*, 813 F.2d 506 (1st Cir. 1987), and *Ochoa Realty Corp.* v. *Faría*, 815 F.2d 812 (1st Cir. 1987), to that effect.

On April 15, 1993, the United States Court of Appeals for the First Circuit, in an unpublished decision, affirmed the District Court's judgment dismissing the Complaint for failure to state a claim. The First Circuit held that the Complaint, even if aided by Petitioner's subsequent filings, and allowing HPY the benefit of liberal pleading rules, failed to state a claim. Pet. App. A6. The Court of Appeals found that the availability of remedies in the Commonwealth Courts defeated HPY's due process and taking claims, noting that HPY had not filed a reply brief to counter PRASA's assertions of such availability. Pet. App. A5-A6.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide the applicability to this case of the recent decision in *Leatherman* v. *Tarrant County etc.*, 501 U.S. ——, 113 S. Ct. 1160, where this Court held that complaints under 42 U.S.C. § 1983 were subject to the notice pleading standard of Federal Rule of Civil Procedure 8(a). But even aside from the fact-specific nature of this request, there is no issue under *Leatherman* here. Simply, neither of the courts below departed from the standard of pleading mandated in *Leatherman* when they dismissed the Complaint.

The District Court's Opinion and Order found that the Complaint failed to satisfy the pleading standards of Rule 8(a) of the Federal Rules of Civil Procedure at the most basic level. Pet. App. A14. The Court of Appeals affirmed the District Court's holding as to noncompliance with Rule 8(a) of the Federal Rules of Civil Procedure without relying on any heightened pleading standard. Pet. App. A4-A5. In upholding the District Court's decision to dismiss with prejudice, the Court of Appeals noted (Pet. App. A6):

> HPY filed an utterly uninformative complaint. We have effectively treated the additional material scattered in its three oppositions filed in the district court as amendments to the complaint. Even so, HPY has still failed to state a claim . . . . Accordingly, we do not think that the dismissal with prejudice represents an abuse of discretion.

HPY also disputes the availability of remedies for the alleged misconduct before the Commonwealth Courts. But this dispute plainly presents no issue for this Court's review. And, in any event, the additional submissions of facts made by HPY before this Court, even assuming their truth, only serve to reinforce the Court of Appeals' assumption as to the availability of remedies in the Commonwealth Courts.

Petitioner's Appendix shows, among other relevant facts, the following:

(1) After squatters allegedly invaded HPY's property in 1985, HPY filed an action in the Superior Court of Puerto Rico to evict the squatters. The case was merged with other similar actions filed by owners of surrounding properties, Cases Nos. CS85-1429, CS86-2817 *inter alia* (collectively referred to hereinafter as "the eviction action").[1]

(2) Two years later HPY sued the Commonwealth of Puerto Rico in an inverse condemnation action, Case No. 87-6584 (hereinafter, "the inverse condemnation action"), alleging that, because the Police and the Justice Department of Puerto Rico had failed to prosecute the squatters in a criminal action filed by HPY and because the government of Puerto Rico was proceeding with urbanization on the property, the Commonwealth should pay compensation for the alleged taking. Pet. App. A38-A47.

(3) On October 10, 1988, the Commonwealth of Puerto Rico filed a condemnation claim in the Superior Court of Puerto Rico, Case No. 88-0418 (hereinafter, "the condemnation action"). This action seeks to condemn the land neighboring HPY's property, which was also invaded by squatters. Pet. 9.

(4) HPY apprised the Court in the inverse condemnation action that its property might have been included in the condemnation action, Pet. App. A48-A50; and on June 6, 1989, HPY requested dismissal of the inverse condemnation action. The grounds asserted by HPY for such dismissal were:

> *Our surveyors have verified that the encumbered area affected that is the subject of the present litigation is within the condemned property* for which we request

[1] The complaint in the eviction case is not in the record. Some documents pertaining to the eviction action appear in Petitioner's Appendix at A66-A108.

> the dismissal of the present case without prejudice. Pet. App. A51-A52 (emphasis added).

(5) On April 20, 1990, the Court granted the requested dismissal, *with* prejudice. Pet. App. A53-A54. There is no indication in the record as to whether HPY ever sought reconsideration, relief, or *nunc pro tunc* amendment from this arguably clerical error in the judgment, to amend the dismissal to one *without* prejudice.

(6) In a hearing held on November 28, 1990, to entertain HPY's request to intervene in the condemnation action, HPY agreed that its invaded property was not being developed by the public agencies. According to the minutes of the hearing, where HPY was duly represented by counsel,

> the parties had the opportunity to look at some blueprints and some explanations *making it clear that the condemned lot borders the HPY Corporation Development* . . . . Once this situation had been resolved, the Court decided that the intervention was not in order, since the State has no interest in acquiring properties from that Corporation, *since it has its property outside the limits of the condemned area.* As there were no problems, therefore, its intervention is not justified because there is no interest. Pet. App. A60 (emphasis added).

The record does not show if HPY sought an amendment to these minutes. Assuming that the minutes are correct, there is no indication as to why HPY, after having allegedly verified the boundaries of the land by its own surveyors and obtained a voluntary dismissal in the inverse condemnation proceeding, could agree to the apparently opposite conclusion in the condemnation proceeding, which in turn laid the foundation for a denial of intervention. Neither is there any indication as to whether HPY sought reconsideration or relief from the order, or whether HPY timely filed a tort action against any defendant in this lawsuit based on the general tort

statute of Puerto Rico, Article 1802 of the Civil Code of Puerto Rico [31 L.P.R.A. § 5141].

What the record does show is that, out of the three proceedings initiated before the Commonwealth Courts, there was only one proceeding (the eviction action) in which HPY made any effort to request reconsideration, relief, or reopening of the case, and the request to reopen was granted. Pet. App. A69. In fact, HPY obtained a judgment in its favor in the eviction action on June 4, 1991, ordering that HPY recover full and undisturbed possession of the land (Pet. App. A105-A107) and holding that construction undertaken in the invaded land owned by HPY is in bad faith (Pet. App. A94-A95). Under Puerto Rico law, the holding as to bad faith means that any person or entity which has built improvements on HPY's land will lose to HPY whatever has been built, without right to compensation. Article 298 of the Puerto Rico Civil Code provides:

> He who builds, plants or sows in bad faith on another's land, loses what he has built, planted or sown, without having any right to indemnity. [31 L.P.R.A. § 1165].

A further consequence of the adjudication of bad faith is that HPY can demand that the improvements be removed and the property be placed in its condition prior to the occupation. Article 299 of the Puerto Rico Civil Code provides:

> The owner of the land on which any one has built, planted or sown in bad faith, may exact the demolition of the work or the removal of the planting or sowing and the replacing of everything in its former condition, at the expense of the person who built, planted or sowed. [31 L.P.R.A. § 1166].

The record is not clear as to whether HPY has made any meaningful effort to execute the judgment it obtained.

In short, the Commonwealth forum has afforded HPY ample opportunity to seek remedies for the wrongdoings

alleged in this case. If HPY was not diligent in pursuing such remedies, it is not for lack of opportunity.[2] And HPY's case as respects PRASA in particular stands on even hollower ground. As apparent from the Petition, HPY has never undertaken any effort to seek any remedies against PRASA in the Commonwealth Courts before involving it in this lawsuit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 13, 1993

[2] Although the Petition elaborates the idea of a potential *res judicata* effect on a prospective inverse condemnation action as to HPY's land, it has made no showing that such an action has in fact been filed, let alone dismissed on *res judicata* grounds.

Supreme Court, U.S.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN OPPOSITION TO BRIEF FILED BY RESPONDENT PUERTO RICO AQUEDUCT & SEWER AUTHORITY

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October 29, 1993

No. 93-446

IN THE

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OCTOBER TERM, 1993

HPY INC.,

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v.

ELECTRIC POWER AUTHORITY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN OPPOSITION TO BRIEF FILED BY RESPONDENT PUERTO RICO AQUEDUCT & SEWER AUTHORITY

Petitioner, HPY Inc. (hereinafter "HPY") respectfully opposes the Brief in Opposition filed by the Puerto Rico Aqueduct and Sewer Authority.

Although the reasons which we believe warrant the grant of a writ are adequately

stated in the petition, we believe a brief reply is warranted to correct several assertions contained in the Brief in Opposition filed by respondent, Puerto Rico Aqueduct and Sewer Authority (hereinafter "PRASA").

The assertions by the respondent fall into two areas:

1. *The "Exhaustion of Available State Remedies" Issue.*

(a) The Brief in Opposition states (p.3):

> "...even if the complaint could somehow be construed as an invasion of HPY's land by PRASA, it was insufficient to state a cognizable claim under 42 U.S.C. § 1983 in view of the fact that state remedies were available, citing the holdings in *Williamson Planning Comm'n v. Hamilton Bank (incorrectly cited name of case)*, 473 U.S. 172 (1985), *Culebras Enterprises v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987) and *Ochoa Realty Corp. v. Faria*, 815 F.2d 812 (1st Cir. 1987)..."

on page 4 states:

> "...HPY also disputes the availability of remedies for the alleged misconduct before the Commonwealth Courts. But this dispute plainly presents no issue for

this Court's review..."

The facts are stated in the Petition for Writ of Certiorari and are accompanied by Final Orders and Judgments from the Commonwealth Court's of the Commonwealth of Puerto Rico in the appendix. There is a Res Judicata effect in requesting that HPY avail itself of state remedies because the Orders and Judgments rendered against HPY have either been dismissed with prejudice or intervention in actions pending before Commonwealth Courts have been denied. Pet. App. A-53, A-60.

Furthermore, public records were available to respondent(s) which would have put them on notice that the land rightfully and legally belonged to HPY before commencing with any public works projects. Pet. App. A-122-162.

Respondent incorrectly asserts that HPY agreed that its invaded property was not being developed by the public agencies. Opp. Brief p. 6. What is demonstrated by this Minute Order is that the Commonwealth of Puerto Rico had no

intent to expropriate HPY's land on the mistaken belief that it had surveyed the correct parcel of land. A Court Appointed Expert demonstrated otherwise (Pet. App. [illegible]-111) which, perhaps understandably, in nowhere mentioned in the Brief in Opposition. Thus, the exhaustion of available state remedies is perfected and ripe for review under the *Williamson County* rationale. The non sequitur is, we hope obvious.

Moreover, two and only two allegations are required in order to state a cause of action under 42 U.S.C. § 1983:

> 1. The plaintiff must allege that some person has deprived him of a federal right.
>
> 2. the plaintiff must allege that the person who has deprived him of that right acted under color of state or territorial law.

The complaint states the necessary elements under section 1983 and nowhere in the statute or in the legislative history is it mentioned that available state remedies have to

be exhausted before pursuing a Civil Rights Action.

Furthermore, respondent's reliance on the First Circuit's finding that the availability of remedies in the Commonwealth Courts defeated HPY's due process is unfounded. The Supreme Court in *Williamson County* expressly distinguished due process from takings claims, stating that the due process clause may be violated regardless of the availability of post-deprivation remedies. *Williamson County*, 473 U.S. at 195-96 n. 14.

2. *The "Heightened Pleading" Issue.*

The Petition for Writ of Certiorari clearly stated the fact that the District Court stated in it's Order (Pet. App. A-17) that the First Circuit:

> "has been particularly insistent in section 1983 cases to require a fair degree of specificity -- a foundation of material facts -- to survive a motion to dismiss."

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Conley v. Gibson*, 355 U.S. 41; *Charlene Leatherman, et al. v. Tarrant County Narcotics Intelligence and Coordination Unit, et al.*, 61 L.W. 4205, 4206-07. (March 3, 1993).

In conclusion, it is important to note that the Brief in Opposition filed by respondent on October 13, 1993 was mailed to petitioner on October 14, 1993 in violation of Supreme Court Rule 29.3 which states that:

> "Any pleading, motion, notice, brief, or other document required by these Rules to be served may be served personally or by mail on each party to the proceeding at or before the time of filing..."

To certify to this Honorable Court that

Respondent has complied with the Rules of the Supreme Court with respect to service, constitutes a fraud upon the court when Petitioner received the envelope with an October 14, 1993 cancelled postmark.

Finally, we believe, therefore, that a review by this Court is warranted and for the foregoing reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Adrian Mercado, one of the counsel for HPY Inc., and ~~a member~~ of the Bar of the Supreme Court of the United States, hereby certify that, on the 29th day of October, 1993, I served three copies of the reply brief in response to Puerto Rico Aqueduct & Sewer Authority's Opposition Brief on each of the several parties thereto, as follows:

1. On Mirta E. Rodriguez, Esq., Reina Colon Rodriguez, Esq., Carlos Lugo Fiol, Esq., by mailing nine copies by certified mail, with first-class postage prepaid, to the Federal Litigation Division, Department of Justice, P.O. Box 192, San Juan, Puerto Rico, 00902. (809) 721-5636. These Attorneys represent the following parties:

   a. Rural Housing Administration.

   b. Maria Margarita Irizarry, in her individual capacity and as Former Director of the Aqueduct and Sewer Authority.

   c. Gamalier Rodriguez, in his individual capacity and as Former Director of The Rural Housing Administration.

2. On Pedro Santiago Torres, Esq., by mailing six copies by certified mail, with first-class postage prepaid, to P.O. Box 363928, San Juan, Puerto Rico, 00936-3928. (809) 725-1857. This Attorney represents the following:

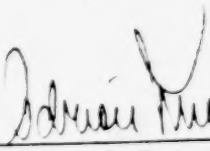
   a. Electric Power Authority.

   b. Jose A. Del Valle, in his individual capacity and as Former Director of The Electric Power Authority.

3. On Jorge Marrero Narvaez, Esq., by mailing three copies by certified mail, with first-class postage prepaid, to P.O. Box 7066, Bo. Obrero Station, Santurce, Puerto Rico, 00916. (809) 758-2542. Who represents the Puerto Rico Aqueduct and Sewer Authority.

4. On Arturo Trias, Esq., and Miguel R. Garay Auban, Esq., by mailing three copies by certified mail, with first-class postage prepaid, to P.O. Box 366283, San Juan, Puerto Rico, 00936-6283. (809) 753-7777. Who represent the Puerto Rico Aqueduct and Sewer Authority.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.



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